Supreme Court, U.S.
FILED

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(1)

No.

IN THE

Supreme Court of the United States

INDYWAY INVESTMENT,
Petitioner,

vs.

DEBRA OPRI, an individual,
OPRI & ASSOCIATES,
a Professional Law Corporation,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEALS
SECOND APPELLATE DISTRICT, DIVISION ONE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the State of California's application of a statute that makes a default tax sale of real property by the County of Los Angeles conclusively valid, when the County executed and recorded an original and *only* notice of power to sell tax-defaulted property identifying the state assigned item numbers selected for the state assigned auction sale and auction year that the tax-defaulted property was placed in but was subsequently used for a completely different auction sale and auction year, fails to provide due process of the law to real property owners, and so violates the Fifth Amendment and the Fourteenth Amendment.

2. Whether the State of California's application of a statute that makes a default tax sale of real property by the County of Los Angeles conclusively valid, when the County executive deleted the original and *only* recorded notice of power to sell tax-defaulted property and therefore required a new notice of power to sell tax-defaulted property to be executed and recorded prior to the noticed tax sale; and when the County rescinded the original and *only* recorded notice of power to sell tax-defaulted property, thereby rendering the original and *only* recorded notice of power to sell tax-defaulted property null and void because the real property had been redeemed, fails to provide due process of the law to real property owners, and so violates the Fifth Amendment and the Fourteenth Amendment.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Indyway Investment, an unincorporated business trust, brought this civil action against its former attorney and her law firm. Indyway Investment is not a corporation, does not have a parent company, and there is no publicly held company that owns more than ten percent (10%) of Indyway Investment.

Respondents, Debra A. Opri was sued as an individual in personal capacity as the attorney of record for Petitioner, and her law firm, Opri & Associates, a professional law corporation, was also named a defendant.

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OPINIONS BELOW

All the Respondents participated in the trial court action and the appeal taken to the Division One of the Second Appellate District of the State of California. On November 29, 2007, Division One issued an unpublished opinion affirming the Los Angeles County trial court decision. A copy of that opinion is attached hereto as Appendix A. Petitioner filed a petition for rehearing with Division One of the Court of Appeals. On December 27, 2007, Division One denied the petition for rehearing. A copy of the denial is attached hereto as Appendix B.

Petitioner's appeal was based upon the Los Angeles County Superior Court judgment, statement of decision, and minute order. A copy of the Los Angeles County Superior Court judgment filed January 9, 2006 is attached hereto as Appendix C. A copy of the Los Angeles County Superior Court statement of decision filed on December 23, 2005 is attached hereto as Appendix D. A copy of the Los Angeles County Superior Court minute order dated December 23, 2005 is attached hereto as Appendix E.

On February 27, 2008, the Supreme Court of California, En Banc, denied Petitioner's request for a petition for review. A copy of that denial is attached hereto as Appendix F.

JURISDICTION

Division One of the Second Appellate District of the California Court of Appeal entered its judgment on November 29, 2007 and denied a petition for rehearing on December 27, 2007. The Supreme Court of California denied the petition for review on February 27, 2008. This petition is filed within 90 days of the latter date. This Court's jurisdiction is invoked under *28 U.S.C.A. §1257(a).*

> "Final judgments ... rendered by the highest court of a State ... may be reviewed by the Supreme Court by writ of certiorari ... where any ... right [or] privilege ... is specially set up or claimed under the ... statutes of ... the United States." *28 U.S.C. §1257.*

Where, as here, the state appellate court's judgment wrongfully deprives the petitioners, and all similarly situated real property owners in the State of California of their constitutionally protected rights by not resolving conflicts between a California statute that presumes a tax sale conclusively valid against federally protected rights of providing property owners due process of law before the taking of their property – the Court has jurisdiction to grant certiorari and hear and decide the case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Fifth Amendment to the United States Constitution states, "No person shall ... be deprived of life, liberty, or property, without due process of law"; and relevant provisions of the Fourteenth Amendment to the United States Constitution provides, "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

1. The Fifth and Fourteenth Amendments to the United States Constitution prohibit a state from depriving any person of life, liberty, or property, without due process of law.

2. This is an action for damages sustained by Petitioner Indyway Investment ("Petitioner") as a result of the legal malpractice committed by attorney Debra A. Opri and her law office Opri & Associates ("Respondents").

3. Petitioner owned certain properties located in Long Beach, California (the "Subject Properties"), which the County of Los Angeles (the "County") deemed them to be tax-defaulted properties by executing and recording original and *only* notices of power to sell tax-defaulted property in August 1997 identifying the state assigned item

numbers for the state assigned auction sale and auction year.

4. The County's execution and recordation of the original and *only* notices of power to sell tax-defaulted property reflected the state assigned item numbers that identified the state assigned auction sale and auction year that the Subject Properties were placed in, which were selected for the 1998A Auction Sale that was held on February 25, 1998.

5. The County subsequently canceled the status of the original and *only* recorded notices of power to sell tax-defaulted property by "EXECUTIVE DELETE" on February 3, 2000, prior to the tax sale.

6. The Subject Properties were not placed in but were pulled out of the 1998A Auction Sale of February 25, 1998.

7. The County allegedly sold the Subject Properties at a purported tax-defaulted property sale at the 2000B Auction of June 26, 2000 — even after the County had executive deleted the status of the original and *only* recorded notices of power to sell tax-defaulted property on February 3, 2000.

8. The County subsequently executed and recorded rescissions of notice of power to sell tax-defaulted property in January of 2001 because the Subject Properties were redeemed back to Petitioner.

9. Petitioner had hired Respondents to file a claim to set aside the tax sale of the Subject Properties. Instead, Respondents filed a claim for the excess proceeds from the sale, and failed to file a claim to set aside the tax sale of the Subject Properties. On June 16, 2004, Petitioner filed a verified complaint alleging legal malpractice and breach of contract against Respondents.

10. The parties' stipulated and the trial court ordered the bifurcation of issues at trial, so that it would first decide the issue of damages, namely whether a claim to set aside the tax sale of the Subject Properties would have been meritorious. The rationale for the bifurcation was that if damages could not be proven, there could be no case made for legal malpractice.

11. At trial and upon appeal, Petitioner contended that the County failed to follow the proper tax sale procedures under the *California Revenue and Taxation Code* requirements under *section 3691.1*, et seq. The original and *only* notices of power to sell tax-defaulted property for the Subject Properties were selected for the 1998A Auction Sale, *only*, which was held on February 25, 1998. Petitioner claimed that pursuant to *section 3691.1*, the County was required to execute and record a *new* notice of power to sell tax-defaulted property for the 2000B Auction Sale of June 26, 2000.

12. Also at trial and upon appeal, Petitioner attempted to prove that the County

executive deleted the original and *only* recorded notices of power to sell tax-defaulted property. Petitioner claimed that such an executive deletion would, in addition, require *another* "notice" to the real property's owners of another power to sell the property. The County did not execute and record *new* notices of power to sell tax-defaulted property pursuant to *section 3691.1*, after the County had "executive deleted" the original and *only* recorded notices of power to sell tax-defaulted property.

13. Petitioner challenged the County's actions of providing notice of the tax sale and the taking of real property without due process of law. Respondents claimed that the tax sale procedures were conclusively valid under *section 3711* and that Petitioner could not challenge the tax sale except upon proof of fraud.

14. Petitioner contended that the Subject Properties were redeemed back to Petitioner by virtue of the recorded rescissions of notice of power to sell tax-defaulted property. Petitioner attempted to prove that the recorded rescissions of notice of power to sell tax-defaulted property canceled the tax lien and provides notice to the whole world that the delinquent prior taxes have been redeemed pursuant to *California Revenue and Taxation Code section 4112*. Petitioner claimed that the redemption date of August 11, 2000 that is stated on the recorded rescissions of notice of power to sell tax-defaulted property redeemed the Subject Properties back to Petitioner.

15. Petitioner claimed that certificates of redemption exist for Petitioner, having number 020009330 attesting to the payment of the amount required to redeem the property assessed to Petitioner that is stated on the recorded rescissions of notice of power to sell tax-defaulted property. Petitioner believes it was prejudicial error for the lower courts to determine the recorded rescissions of notice of power to sell tax-defaulted property had no legal effect under *Revenue & Taxation Code, Section 4112.*

16. Here, Petitioner challenges the validity of the June 2000 tax sale conducted by the County for failing to provide statutorily-required notice to Petitioner which violated Petitioner's constitutionally protected right of due process before the taking of Petitioner's real property.

17. Petitioner contends that the Subject Properties could not be sold by the County because the County had executive deleted the original and *only* notices of power to sell tax-defaulted property from its system in February 2000, some four months prior to the June 2000 tax sale.

18. Additionally, Petitioner claims that the Subject Properties were redeemed in favor of Petitioner and the Subject Properties were returned to Petitioner as evidenced by the County's issuance and recordation of rescissions of notice of power to sell tax-defaulted property in January of 2001.

REASONS FOR GRANTING THE PETITION

California real property owners are currently subject to having their property taken without due process of the law. The *California Revenue and Taxation Code* that regulates and controls the definition, determination, notice and ultimate sale of tax-defaulted real properties have areas of conflict that leave the California real property owners unprotected by statute.

This case represents an example of such a situation where a "catch all" code section providing for a conclusive presumption of validity of a tax sale fails to provide answers for all questions. There is a conflict among code sections under the *Revenue and Taxation Code*[1] that control the sale of tax-defaulted real property by taxing authorities. The competing *Revenue and Taxation Code sections* are *section 3711* which provides for that a tax deed is conclusive evidence of the regularity of the tax sale; *section 3691.1* which provides for an execution and a recordation of a notice of power to sell real property; and *section 4112(c)* which provides that when the notice of power to sell real property recorded under *section 3691.4* is redeemed, the notice becomes null and void and the tax collector shall execute and record with the county recorder a rescission of notice.

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[1] Unless otherwise indicated, all code section references in this petition for writ of certiorari are to *California's Revenue and Taxation Code.*

Pursuant to *section 3711*, the issuance of a tax deed is conclusive evidence of the validity of the underlying tax sale, absent fraud or constitutional violations. The Court of Appeal agreed with the trial court that *section 3691.1* had been satisfied with a single recordation of notice of power to sell tax-defaulted property by the County in August of 1997. Petitioner contends that this issue concerning *section 3691.1*, whether the notice of power to sell tax-defaulted property is required only once, is undetermined and unanswered by California statute or case law.

This recorded notice of power to sell tax-defaulted property from the County pursuant to *section 3691.1* is a statutory prerequisite to its right to publish and place a tax-defaulted property in a state tax auction. Without the implementation of this statutory prerequisite (that gives the whole world constructive notice that a property is in a tax default status and is set to be sold at a future state tax auction), every other statutory procedure leading to a state tax auction has no validity because all the pertinent information needed to follow **constitutional due process requirements** are extracted from this recorded notice of power to sell tax-defaulted property such as, and not limited to, the state assigned item numbers that identify the state assigned auction sale and auction year that the tax-defaulted property are placed in of which the property owner may accurately and timely oppose or challenge.

In the present case, the County deemed the Subject Properties in tax default status by executing and recording original and *only* notices of power to sell tax-defaulted property on August 15, 1997 reflecting the state assigned item numbers selected for the 1998A auction sale, which were scheduled for February 25, 1998. However, the Subject Properties were not placed in but were pulled out of the 1998A auction sale. Petitioner challenged that the County failed to provide *another* notice of power to sell tax-defaulted property that the Subject Properties had become subject to the power of sale, pursuant to *section 3691.1*. However, the County proceeded to purportedly sell the Subject Properties in the 2000B Auction Sale without subsequently providing *another* execution and a recordation of a *new* notice of the power to sell tax-defaulted property.

Petitioner also claimed that the County did not follow the procedures for defaulted tax sale as set forth in the *Revenue and Taxation Code*. Petitioner contended that, prior to the tax sale, the County had executive deleted the original and *only* recorded notices of power to sell tax-defaulted property, therefore requiring a *new* notice of power to sell tax-defaulted property to be executed and recorded prior to tax sale of the defaulted property by public auction. Specifically, Petitioner challenged that the County failed to provide notice that the Subject Properties had become subject to the power of sale, pursuant to *section 3691.1*. The County proceeded to purportedly sell the Subject

Properties without subsequently providing *another* execution and a recordation of a *new* notice of the power to sell tax-defaulted property.

Petitioner challenged that the Subject Properties had been redeemed back to Petitioner by virtue of the County recording a rescission of notice of power to sell tax-defaulted property pursuant to *section 4112.*

At trial and upon appeal, Petitioner presented evidence and argued that the County's employees admitted that the original and *only* recorded notice of power to sell tax-defaulted property was "executive deleted." Respondents raised the defense of *section 3711*, supporting the validity of tax sale, and Petitioner attempted to prove that the County's actions amounted to fraud. However, in the face the "conclusive presumption" of the regularity of the tax sale proceedings, proving fraud by the County was a difficult burden to overcome.

Petitioner contends that the County's action in the present case may not have amount to "fraud" but the County's actions nonetheless were sufficient to deprive Petitioner of its due process protections against the taking of property.

Here, the County's actions of canceling the original and *only* recorded notices of power to sell tax-defaulted property by "executive delete" o n February 3, 2000, prior to the tax sale, prevented the tax sale of the real property by public auction

without an execution and a recordation of *a new* notice of power to sell tax-defaulted property, pursuant to *section 3691.1*, first being sent again to the owners of the real property.

Petitioner does not believe that it should lose its real property over the County's admitted actions of executive deleting the original and *only* recorded notices of power to sell tax-defaulted property. *Section 3691.1* provides that, "the tax collector shall execute a notice ***whenever*** a parcel becomes subject to the power of sale set forth in *Section 3691* on a form prescribed by the Controller. The county clerk shall take acknowledgment of the notice without charge." [emphasis added.] The original and *only* recorded notices of power to sell tax-defaulted property were invalid, as they had been canceled by the County by "executive delete" on February 3, 2000, prior to the tax sale. Therefore, Petitioner argues that a *new* "notice" pursuant to *section 3691.1* should have been executed and recorded before the Subject Properties could have been sold at a purported tax sale. Petitioner contends that *section 3691.1* is vague and ambiguous as to the term "***whenever a parcel becomes subject to the power of sale.***"

Respondents, the County, the trial court and the Court of Appeals apparently interpret the term "whenever" to mean as only once, after the 5-year tax default occurs. [*Code section 3691(a)(1)(A)*] Petitioner contends that *section 3691.1* notice is not limited to only once, otherwise the *section 3691.1* would have not have stated that notice is required

"***whenever*** a parcel becomes subject to the power of sale" but would have stated that notice is required "***only once after*** a parcel becomes subject to the power of sale."

There is a disparity and conflict in the interpretation of *sections 3691* and *3691.1* among these parties, it is a question that **potentially affects all California owners** of tax-defaulted properties and the receipt of notice of the power to sell their tax-defaulted properties.

Also at trial and upon appeal, Petitioner presented evidence and argued that the Subject Properties were redeemed back to Petitioner by virtue of the recorded rescissions of notice of power to sell tax-defaulted property. Petitioner contends that the Subject Properties were redeemed back to Petitioner by virtue of the County executing the recorded rescissions of notice of power to sell tax-defaulted property and payment of the defaulted taxes.

Section 4112, in pertinent part, provides that, "(c) When tax-defaulted property subject to the notice recorded under Section 3691.4 is redeemed, the notice becomes null and void and the tax collector shall execute and record with the county recorder a rescission of the notice" [emphasis added.] Because the original and *only* recorded notices of power to sell tax-defaulted property were invalid, as they had been canceled by the County by "executive delete" on February 3,

2000, prior to the tax sale, Petitioner's right of redemption was preserved.

Therefore, Petitioner argues that there is no limitation as to who may pay the taxes on the Subject Properties and that the County had accepted the payment of taxes from a volunteer in August 2000. Petitioner contends that *Revenue and Taxation Code section 4112* that governs the recorded rescissions of notice of power to sell tax-defaulted property redeemed the Subject Properties back to Petitioner because the volunteer acquires no right whatsoever by the payment of taxes on the land of another. *Spencer v. Harmon Enterprises, Inc.*, (1965) 234 Cal.App.2d 614.

This Court should grant review to resolve the conflict of *section 3711* "conclusive evidence" provision; *section 3691.1* requirement of providing notice *whenever* the parcel(s) become subject to the power of sale; and *section 4112* redeeming provision. *Section 3711* requires evidence of fraud to overcome the conclusive presumption of validity of the tax sale proceedings, yet an admitted intentional act, negligence or mistake by the County employees under *section 3691.1* is not sufficient to overcome the presumption of validity of the tax sale. If this inherent conflict between *section 3711* and *section 3691.1* is not resolved, **all California owners of tax-defaulted properties are in jeopardy of having their real property sold by tax sale without proper due process notice.** *Section 4112*, that governs the recorded rescissions of notice of power to sell tax-defaulted

property redeemed the Subject Properties back to Petitioner, supersedes the tax sale because Petitioner's right of redemption was preserved after the original and *only* recorded notices of power to sell tax-defaulted property had been canceled by the County by "executive delete" on February 3, 2000, prior to the tax sale.

LEGAL DISCUSSION

California statutory and case law is silent and undetermined on whether a conclusive presumption of the validity of a tax sale overcomes the requirements of proper recordation by the taxing authority of the notice of power to sell the tax-defaulted property. Petitioner hereby challenges the conflict between code *sections 3711, 3691.1* and *section 4112* that has resulted in an inconsistent and harmful taking of real property. Here, the above-referenced code sections, as applied, has upheld and validated the County of Los Angeles' actions in the tax sale. The trial court and Court of Appeals found that Petitioner had received "actual notice" of the tax sale as required under *Revenue and Taxation Code section 3701*, et seq. The lower courts also validated the tax sales pursuant to *section 3711* finding that no fraud had occurred in the process of the tax sale.

There is a discrepancy and ambiguity in *section 3691.1* that requires notice "whenever" the parcel becomes subject to sale. Although *section 3691* defines when parcel becomes subject to the power to sell, Petitioner contends that the notice

requirement arises for each parcel, after the 5-year tax default period and remains valid for until the parcel is either redeemed or the power to sell is otherwise removed. A different interpretation would not be consistent with the language of *section 3691.1*. Petitioner claims that if the legislature had intended for the power to sell to be noticed only once, *section 3691* would have so stated. *Section 3691.1* does not make such limitation, it states notice shall be provided "whenever" the property becomes subject to the power of sale.

In the present situation, the County failed to execute and record *new* notices of power to sell tax-defaulted property for the 2000B Auction Sale of June 27, 2000. This recorded notice of power to sell tax-defaulted property from the County pursuant to *section 3691.1* is a statutory prerequisite to its right to publish and place a tax-defaulted property in a state tax auction where pertinent and vital information are stated, such as, and not limited to, the state assigned item numbers for the tax-defaulted property. These state assigned item numbers are very important to meet **constitutional due process requirements** because they are equivalent to serial numbers in that they identify the state assigned auction sale and auction year that the tax-defaulted property are placed in of which the property owner may accurately and timely oppose or challenge the sale of their tax-defaulted properties.

The validity of the 2000B Auction Sale of June 26, 2000 was affected by the County's failure to follow this statutory prerequisite to its right to publish and place a tax-defaulted property in a state tax auction pursuant to *section 3691.1.* This disparity and conflict in the interpretation of *sections 3691* and *3691.1* among these parties can **potentially affect all California real property owners of their constitutional due process rights** to accurately and timely oppose or challenge the sale of their tax-defaulted properties and the receipt of notice of the power to sell their tax-defaulted properties.

Here, however, Petitioner's alternative presentation of evidence and argument was that the County executive deleted the Subject Properties notices of power to sell tax-defaulted property. Despite Petitioner's evidence and argument, the lower courts held that the County's actions of executive deleting the notices of power to sell tax-defaulted property, prior to the tax sale, and then purportedly selling the real properties without a subsequent execution and a recordation of a new notice of the power to sell tax-defaulted property was statutorily valid. *Section 3691.1* requires that a Tax Collector execute a notice of power to sell tax-defaulted property *whenever* the property becomes subject to the power to sell. The lower courts also ignored Petitioner's offer of evidence and argument that *section 4112* that governed the recorded rescissions of notice of power to sell tax-defaulted property which redeemed the Subject Properties back to Petitioner because a volunteer acquires no

right whatsoever by the payment of taxes on the land of another. *Spencer v. Harmon Enterprises, Inc.*, (1965) 234 Cal.App.2d 614.

A tax sale proceeding is wholly a creature of statute. *Craland, Inc. v. State of California* (1989) 214 Cal.App.3d 1400, 1403, 263 Cal.Rptr. 255; *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 40, 77 Cal.Rptr.2d 709, 960 P.2d 513. It follows that there are no common law remedies for defects in tax sale proceedings. *Van Petten v. County of San* Diego (1995) 38 Cal.App.4th 43, 46, 51, 44 Cal.Rptr.2d 816; 5 Miller & Starr, Cal. Real Estate (3d ed. 2005) section 11:148, pp. 389-393. The *Revenue and Taxation Code* provides: "except as against actual fraud, the [tax] deed duly acknowledged or proved is conclusive evidence of the regularity of all proceedings from the assessment of the assessor to the execution of the deed, both inclusive." [*Revenue and Taxation Code section 3711*] In the absence of specified exceptions that do not apply here, a tax deed "conveys title to the purchaser free of all encumbrances of any kind existing before the sale." [*Revenue and Taxation Code section 3712*]

The presumption of regularity under *section 3711* is rebuttable as to the jurisdictional issue of compliance with due process. *Philbrick v. Huff* (1976) 60 Cal.App.3d 633, 648-649, 131 Cal.Rptr. 733; 5 Miller & Starr, Cal. Real Estate (3d ed. 2005) section 11:148, pp. 389-390. Here, Petitioner challenged the County's failure to comply with the

procedures under Revenue and Taxation Code *sections 3701*, et seq.

Because a tax sale is imposed against an adverse party without consent, "every essential step leading to the execution of a tax deed must be strictly followed." *Paul v. Los Angeles County Flood Control Dist.* (1974) 37 Cal.App.3d 265, 275, 112 Cal.Rptr. 274.

Petitioner elicited testimony of County employees of the executive deletion of the original recorded notices of power to sell tax-defaulted property prior to the tax sale. The County's admitted executive deletion of the original and *only* notices of power to sell tax-defaulted property should have forced the County to remove the parcels from that noticed tax sale and should have required the County to execute and record *new* notices of power to sell tax-defaulted property, pursuant to *section 3691.1.*

Also at trial and upon appeal, Petitioner presented evidence and argued that the Subject Properties were redeemed back to Petitioner by virtue of the recorded rescissions of notice of power to sell tax-defaulted property and payment of property taxes. The trial court dismissed the recorded rescissions of notice of power to sell tax-defaulted property as a confusing practice by the County, in the context of a default sale because it was prompted by the payment of the taxes. However, the language stated on the recorded rescissions of notice of power to sell tax-defaulted

property contradicts the trial court's opinion in that certificates of redemption exist for Petitioner, having number 020009330 attesting to the payment of the amount required to redeem the property assessed to Petitioner.

Petitioner contends that the Subject Properties were redeemed back to Petitioner by virtue of the County executing the recorded rescissions of notice of power to sell tax-defaulted property. *Section 4112*, in pertinent part, provides that, "(c) When tax-defaulted property subject to the notice recorded under Section 3691.4 is redeemed, the notice becomes null and void and the tax collector shall execute and record with the county recorder a rescission of the notice" [emphasis added.] Petitioner's right of redemption was preserved because the original and only recorded notices of power to sell tax-defaulted property were invalid, as they had been canceled by the County by "executive delete" on February 3, 2000, prior to the tax sale. Therefore, Petitioner argues that there is no limitation as to who may pay the taxes on the Subject Properties and that the County had accepted the payment of taxes from a volunteer in August 2000. Petitioner contends that *section 4112*, that governs the recorded rescissions of notice of power to sell tax-defaulted property, redeemed the Subject Properties back to Petitioner because the volunteer acquires no right whatsoever by the payment of taxes on the land of another. *Spencer v. Harmon Enterprises, Inc.* (1965) 234 Cal. App. 2d 614.

Petitioner acknowledges the stated purpose of *section 3711* is for the protection of the process of tax sales against challenges against minor mistakes. The conclusive evidence of *section 3711* can be challenged for jurisdictional due process violations or for fraud. However, Petitioner claims that jurisdictional or fraud challenges cannot be the exclusive remedy for dispossessed property owners. *Section 3711* cannot stand to conclusively presume the validity of tax sale when the County admits to making intentional, negligent or mistaken actions that deprive the property owner of its property.

In the present situation, the County admitted that the notices of power to sell tax-defaulted property were "executive deleted" prior to the tax sale, this is an integral element of "notice" to the property owner. Any failure of notice to the property owner should invalid the tax sale and the transfer of the real property. The statutory scheme behind the taking and selling of tax-defaulted property requires notice to the property owners, not only of the tax sale but the County's right and power to sell the tax-defaulted parcels. Even though the lower courts found that Petitioner had actual notice of the tax sale, if the notices of power to sell tax-defaulted property had been "executive deleted", prior to the tax sale, Petitioner failed to have proper notice of the County's power to sell the parcels.

The legislature cannot make a tax deed conclusive evidence of jurisdictional matter prerequisite to state's right to execute a deed to a purchaser at tax sale. *Litchfield v. Marin County* (1948) 83 Cal.App.2d 730, 189 P.2d 750. *Sections 3711, 3365, 3518* and *3701*, which authorize sale of property for delinquent taxes without actual notice to owner cannot cure jurisdictional defect, that is, one which is constitutionally indispensable step. *Chesney v. Gresham* (1976) 64 Cal.App.3d 120, 134 Cal.Rptr. 238.

CONCLUSION

There are undetermined areas of law within California's tax-defaulted real property laws under the *Revenue and Taxation Code*. Petitioner contends that there is an ambiguity in *section 3691.1* as to whether the taxing authority is required to record the notice of power to sell tax-defaulted property only once or each time the real property is subject to sale. There is also the unanswered question of whether the County, prior to the tax sale, can "executive delete" the notice of power to sell tax-defaulted property and subsequently, sell the Subject Properties without executing and recording a *new* notice of power to sell tax-defaulted property. Additionally, *section 3711* cannot be used to conclusively validate a tax sale when the County admitted making errors in regards to the tax sale.

Furthermore, *section 4112* that governs the recorded rescissions of notice of power to sell tax-defaulted property supersedes the tax sale because Petitioner's right of redemption was preserved after the original and *only* recorded notices of power to sell tax-defaulted property had been canceled by the County, prior to the tax sale, by "executive delete" on February 3, 2000. Because there is no limitation as to who may pay the taxes on the Subject Properties, the County had accepted the payment of taxes from a volunteer in August 2000, who acquired no right whatsoever by the payment of taxes on the land of another.

This Court should grant review to resolve the conflicts of *section 3711* "conclusive evidence" provision and *section 3691.1* requirement of providing notice *whenever* the parcel(s) become subject to the power of sale along with *section 4112* redeeming provision. *Section 3711* requires evidence of fraud to overcome the conclusive presumption of validity of the tax sale proceedings, yet an admitted intentional act, negligence or mistake by the County employees under *section 3691.1* and *4112* is not sufficient to overcome the presumption of validity of the tax sale. If this inherent conflict between *section 3711* and *section 3691.1* along with *section 4112* is not resolved, all California owners of tax-defaulted properties are in jeopardy of having their real property taken and sold by the taxing authorities, without proper due process of the law.

Dated: May 23, 2008,

Respectfully submitted,

ARTIANO & ASSOCIATES, APC

By: JAMES ARTIANO
Counsel of Record
and
ERIC M. NAKASU

Attorneys for Petitioner
Indyway Investment

Filed 11/29/07 Indyway Investment v. Opri CA2/1

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

B189573
(Los Angeles County Super. Ct.
No. BC317170)

INDYWAY INVESTMENT,

Plaintiff and Appellant,

v.

DEBRA A. OPRI et al.,

Defendants and Respondents.

APPEAL from a judgment and an order of the Superior Court of Los Angeles County. David A. Workman, Judge. Affirmed.

Artiano, Guzman & Toomey, Artiano Guzman, Artiano & Associates, James Artiano, Grace A. Lou and Joanne K. Leighton for Plaintiff and Appellant.

Nemecek & Cole, Jonathan B. Cole, David B. Owen and Mark Schaeffer for Defendants and Respondents.

Plaintiff Indyway Investment (Indyway) failed to pay property taxes on two of its commercial rental properties (Properties). The Los Angeles County Tax Collector sold the Properties at a tax default property auction in June 2000. Indyway sued its former attorneys, defendants Debra Opri and Opri & Associates (Opri), for legal malpractice and breach of contract, alleging that Opri failed to file a claim to set aside the tax auction sales. Indyway asserted the tax sales were invalid for lack of proper notice. After a trial by court, the court found that Indyway failed to prove that it would have prevailed on a claim against Los Angeles County to set aside the tax sales and therefore failed to establish all necessary elements of its causes of action for legal malpractice and breach of contract. Indyway appealed from the judgment in favor of Opri and from an order denying Indyway's motion to tax costs. We affirm both the jugment and the order because Indyway's challenges to the sufficiency of the evidence to support the judgment are without merit and Indyway fails to establish the court erred in denying the motion to tax costs.

BACKGROUND

A. Trial

On May 8, 1992, Indyway was created. Also on May 8, Rudy and Melissa Diaz, husband and wife, conveyed the Properties and three other parcels to Indyway for 21 silver dollars. The document creating Indyway characterized it as a "Non-Associated Unincorporated Business Trust Organization." Deron Brunson was appointed Indyway's trustee. As trustee, Brunson had "absolute and exclusive power and control over the management and conduct of the businesses and affairs of [Indyway]." Melissa Diaz (Diaz) acted as Indyway's manager and meetings of Indyway were held at the Diaz residence on Baltic Avenue in Long Beach (the Baltic Avenue address). The Indyway document declared that because any property purchased by Indyway was required to be purchased with silver dollars and not federal reserve notes, its property was not subject to taxation under California law. Indyway paid no property taxes.

In August 1997, the Los Angeles County Treasurer and Tax Collector (Tax Collector) recorded in the Recorder's Office of Los Angeles County a Notice of Power to Sell Tax-Defaulted Property with respect to the Properties. By June 2000, Indyway owed about $21,000 in taxes on the Properties, together valued at $450,000. According to Diaz, up to October 1999, Indyway provided to Los Angeles County a mailing address of Post Office Box 832 in North Hollywood (the North Hollywood address).

In October 1999, Diaz contacted the Tax Collector's office regarding the tax status of the Properties. By letter dated October 13, 1999, a deputy in that office, Inez Duarte, wrote to Diaz in response to Diaz's telephone call. Duarte's letter stated that the Properties were eligible for tax sale, that Diaz had asked that all notices for the Properties be sent to the Baltic Avenue address, that cards for changing Indyway's mailing address were enclosed for each parcel, and that the completed cards should be returned to the Los Angeles County Assessor's Office (Assessor). Diaz testified that the October 1999 letter contained an error: Diaz claimed that the new mailing address for Indyway that she gave to Duarte over the telephone was not the Baltic Avenue address, but Post Office Box 6025 in Long Beach.

In May 2000, after conducting a search for the names and addresses of all parties with an interest in the Properties, including an Internet "Super Pages" search and hiring a private title company to obtain a parties of interest report, the Tax Collector generated an auction mailing list for the public auction scheduled for June 26, 2000. The list contained 11 different addresses associated with Indyway or the Properties. The Tax Collector sent, by certified mail, return receipt requested, notices of auction for each of the Properties to the 11 addresses. No notice of auction was sent to Post Office Box 6025 in Long Beach because both before and after the June 26, 2000 tax auction, Los Angeles County had no record associating that address with Indyway or the Properties.

Several of the certified mail cards were signed and returned to the Tax Collector, indicating that Indyway received the notices of the auction of the Properties scheduled for June 26, 2000. Returned to the Tax Collector from accompanying notices of auction sent to Indyway at the Baltic Avenue address were two certified mail cards (one for each of the two parcels) with the signature "Deron Brunson," Indyway's trustee. Also returned to the Tax Collector from an accompanying notice of auction sent to Indyway at the North Hollywood address was a certified mail card with the signature of Rose Diaz, Diaz's mother-in-law.

At the trial in October 2005, Diaz testified that Rose Diaz was not authorized to pick up Indyway's mail, that Rose Diaz did not have keys to the North Hollywood post office box, and that Indyway stopped using that post office box in 1996. Brunson testified, denying that his signature appeared on the certified mail cards accompanying the notices of auction sent to the Baltic Avenue address.

In testimony expressly rejected by the trial court as "an offensive contrivance," Diaz maintained that on October 16, 1999, change of address cards changing Indyway's address to Post Office Box 6025 in Long Beach were mailed to the Assessor, along with a "proof of service" signed by Diaz's acquaintance, Ray Amavisca. Copies of the change of address cards and the proof of service were admitted into evidence. Amavisca testified that Diaz called him on the morning of October 16 and asked him to help her take care of something. They first went to a

store to get envelopes. Either at the store or at the post office, Amavisca signed a proof of service for the change of address cards for the Properties. He immediately placed the change of address cards and the proof of service in an envelope addressed to the Assessor, sealed the envelope, and mailed the envelope. He denied doing anything else with the signed proof of service and denied giving the proof of service to Diaz after he signed it and before he sealed it in the envelope. When Amavisca was asked how there could be a photocopy of the proof of service containing his signature if Amavisca signed it and them immediately mailed it, Amavisca said that he did not recall exactly, but "we could have made a copy of that first." Diaz thereafter testified that she made a copy of the signed proof of service when she and Amavisca were at Office Depot.

John Moreno, who oversees the unit in the Assessor's office that processes changes of address cards, testified that the Assessor's records contained no cards for changing Indyway's address. And the Tax Collector's files contained no form for Indyway indicating that, before June 26, 2000, it had changed its address to Post Office Box 6025 in Long Beach.

The last day on which Indyway could have redeemed the Properties was the Friday before the June 26 auction, or June 23, 2000; Indyway did not redeem the Properties. At the auction of the Properties on June 26, 2000, Sung Won Yi purchased them for $82,000. Yi was not acting on behalf of Indyway. Yi obtained deeds to the Properties and thereafter transferred titles to Pyung Im.

In July 2000, Diaz wrote a letter to the Tax Collector, claiming the tax sales of the Properties were improper for various reasons and requesting that the sales be rescinded. In August 2000, Diaz also sent to the Tax Collector her declaration and a "notice of grievance and protest" and a "demand [for] cancellation of sale." Neither of the foregoing documents alleged that the notices of the auction were sent to the wrong mailing address for Indyway even though Diaz received copies of the notices from the Tax Collector's files on July 12, 2000, which notices reflected where they were sent. After the sales, county counsel reviewed the Tax Collector's file on the Properties and concluded that the sales were valid and would not be rescinded.

After the tax deeds were issued to Yi and the taxes were paid in full, a Los Angeles County computer system erroneously generated for each of the Properties a "rescission of notice of power to sell," which was recorded in January 2001. The Tax Collector later determined that such documents, which were generated when the taxpayer *redeemed* a property in tax default, were unnecessary when a property was sold in a tax sale because the deed given to the purchaser operated to cancel the prior tax lien. After discovering the computer error, the Tax Collector corrected the error by recording a cancellation of the rescission of notice of power to sell as to each of the Properties.

After the trial, the court issued a statement of decision in which the court expressly found the testimony of Amavisca, Diaz, and Brunson not to be

credible. The court gave "no credence whatsoever" to the October 1999 change of address cards, which the court considered an "offensive contrivance." The court found that Indyway had actual notice of the June 26, 2000 tax auction, Indyway's due process rights were not violated by the tax sales of the Properties because Los Angeles County complied with all relevant laws and procedures, and there was no fraud in connection with the tax sales. The court determined that Indyway would not have prevailed on a claim to set aside the tax sales of the Properties, thus rendering without merit its causes of action for legal malpractice and breach of contract. Judgment was entered in favor of Opri.

B. Post-trial Motions for Costs

After trial, Opri filed a motion seeking approximately $91,000 (later amended to approximately $89,000) in reasonable expenses, including attorney fees, incurred in proving the truth of matters which were claimed to have been unreasonably denied by Indyway in response to Opri's request for admissions. (See Code Civ. Proc., § 2033.420.) Indyway filed opposition to the motion. The court denied Opri's motion for expenses.

Opri also filed a memorandum of costs, seeking attorney fees and approximately $17,000 in costs. Indyway filed a motion to strike or to tax costs on the ground that the denial of the motion for expenses under Code of Civil Procedure section 2033.420 collaterally estopped Opri from obtaining costs and attorney fees by way of a memorandum of costs. Opri

filed a "statement of position relative to plaintiff's motion to tax costs" in which Opri conceded that, based on the court's denial of the motion for expenses, Opri was not entitled to recover attorney fees "as an item of costs in this action," but contended that the remaining items of costs sought in the memorandum of costs were recoverable. After a hearing on the motion to tax costs in March 2006, the court granted the motion to tax costs as to the attorney fees, but otherwise denied the motion, awarding Opri costs of $17,355.98. Opri had in addition filed a separate motion for contractual attorney fees. In June 2006, the court granted the motion for attorney fees and pursuant to an Order on Stipulation awarded Opri approximately $130,000 in attorney fees.

Indyway appealed from the judgment and from the order denying its motion to tax costs of approximately $17,000.

DISCUSSION

A. Appeal from Judgment

Indyway contends that the court erred in ruling (1) that it had actual notice of the tax sales, (2) that its due process rights were not violated, (3) that there was no fraud in connection with the tax sales, (4) that Indyway did not redeem the Properties, and (5) that Los Angeles County failed to comply with Revenue and Taxation Code sections 2610.5 and 3691.1.[1]

---

[1] Unspecified statutory references are to the Revenue and Taxation Code.

Although framed as legal issues, Indyway's first four arguments constitute challenges to the sufficiency of the evidence, which challenges, as we explain below, are without merit. Because the fifth argument was not made in Indyway's trial brief or at trial, it has not been preserved for appeal. Were we to address the fifth contention, we would conclude that it is unsupported by any evidence in the record.

"Revenue and Taxation Code section 3691 authorizes a tax collector to sell tax-defaulted property five or more years after the default. The owner's right to redeem the property terminates at the close of business on the last business day before the sale is set. (Rev. & Tax. Code, § 3707.) [¶] Any person may purchase at a tax sale. The Revenue and Taxation Code spells out the procedures under which the sale is made, for giving notice prior to the sale, and for sharing of proceeds by taxing entities. (Rev. & Tax. Code, § 3691 et seq.) On receipt of the full purchase price the tax collector executes a deed to the purchaser. (Rev. & Tax. Code, § 3708.) . . . [¶] Except as against fraud, a tax deed is conclusive evidence that the proceedings from the assessment to the execution of the deed were regularly performed. (Rev. & Tax. Code, § 3711.)" *(Quelimane Co. v.*

Section 2610.5 deals with the requirement that the tax collector mail annual tax bill notices for properties on the secured roll.

Section 3691.1 deals with the notice by the tax collector that a tax-defaulted parcel has become subject to the power of sale.

Stewart Title Guaranty Co. (1998) 19 Cal.4th 26, 39-40.)

Notwithstanding section 3711, "[b]oth the United States Constitution and California Revenue and Taxation Code require that a tax collector make a reasonable effort to put interested parties on notice regarding an impending tax sale. [¶] Under section 3701, a tax collector is required to 'make a reasonable effort to obtain the name and last known mailing address of parties [in] interest,' but the 'validity of any sale . . . shall not be affected . . . if a party of interest does not receive the mailed notice.'" (*Bank of America v. Giant Inland Empire R.V. Center, Inc.* (2000) 78 Cal.App.4th 1267, 1272-1273, fn. omitted.) Actual notice to the taxpayer is not required, but "'when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.'" (*Jones v. Flowers* (2006) 547 U.S. 220, 238 (*Jones*), quoting *Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, 315.) Due process requires the government to provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action . . . ." (*Mullane*, at p. 314.)

The trial court expressly found that notices of auction were received by Indyway at the Baltic Avenue address, where Diaz resided and where Indyway regularly conducted its meetings. This finding is supported by substantial evidence, namely, the certified mail cards signed by Brunson, Indyway's trustee. Notwithstanding Brunson's denial that the

certified mail cards bore his signatures, the trial court expressly found Brunson's testimony "suspect and without credibility." The trial court was entitled to compare the handwriting on the certified mail cards with an undisputed exemplar of Brunson's signature on another document. (Evid. Code, § 1417; *Estate of Nielson* (1980) 105 Cal.App.3d 796, 801 [where authorship of will is questioned, trier of fact can determine issue by comparison with genuine or admitted handwriting of testator without aid of testimony by any witness]; *People v. Rodriguez* (2005) 133 Cal.App.4th 545, 554 [under Evid. Code § 1417, jury may determine that criminal defendant signed document by comparing handwriting on questioned document to an authenticated exemplar].) Here, the trial court impliedly did such a comparison and found that Brunson signed the certified mail cards.

The trial court also found that Indyway received a notice of auction at the North Hollywood address, the last known address for Indyway in the Los Angeles County records. This finding too is supported by substantial evidence, namely, a certified mail card signed by Diaz's mother-in-law, showing the retrieval of a notice from Indyway's post office box. Substantial evidence thus supports the conclusion that Indyway had actual notice of the tax sales.

Even if Indyway did not have actual notice, we conclude that substantial evidence supports the finding that the auction sales did not violate Indyway's due process rights because the Tax Collector employed means of notice "'such as one desirous of actually informing the [taxpayer] might

reasonably adopt to accomplish it.'" (*Jones, supra*, 547 U.S. at p. 238.) Here, the trial court found that "the County hired a private title company to obtain a Parties of Interest Report, the County then checked its records for any other properties owned by Indyway, cross-referenced all the names of individuals in its records that were affiliated with Indyway and conducted a Super Pages search in an effort to locate all possible addresses for Indyway." The foregoing steps taken by the Tax Collector were reasonably calculated, under all the circumstances, to give notice to Indyway at those addresses, and therefore the requirements of due process were met.

Our circumstances are distinguishable from those in *Jones, supra*, 547 U.S. 220, which affords no support for Indyway's claim of a due process violation. In *Jones*, a taxpayer successfully challenged the validity of the notice of a tax sale of his property where a certified letter was returned to the state tax commissioner marked "unclaimed" and then notice of the sale was published in a newspaper. The United States Supreme Court explained: "In response to the returned form suggesting that Jones had not received notice that he was about to lose his property, the State did – nothing. For the reasons stated, we conclude the State should have taken additional reasonable steps to notify Jones, if practicable to do so. The question remains whether there were any such available steps." (*Jones*, at p. 234.) After discussing several reasonable follow-up steps which the tax commissioner could have undertaken to provide notice, the court concluded that the "effort to provide notice to Jones of an

impending tax sale of his house was insufficient to satisfy due process given the circumstances of this case." (*Id.* at p. 239.)

The circumstances here are a far cry from those in Jones. The Tax Collector conducted an exhaustive search for addresses associated with Indyway and the Properties, mailing notices by certified mail to 11 different addresses. Signed certified mail cards were returned from two of those addresses. Thus, the evidence establishes that the Tax Collector reasonably could have concluded that the foregoing efforts were successful in affording Indyway actual notice of the sales. To the extent that Indyway's remaining due process arguments are based on credibility determinations and inferences rejected by the trial court, they are without merit.

In connection with the issues of fraud and redemption, Indyway again asks us to make credibility determinations and draw inferences different from those of the trial court, which we cannot do. (*In re S.C.* (2006) 138 Cal.App.4th 396, 415.) Indyway's brief also refers to exhibits which were not admitted at trial and are not included in the appellate record. We conclude that substantial evidence supports the trial court's conclusions that Yi did not purchase the Properties on Indyway's behalf, that there was no fraud in connection with the tax sales, and that Indyway did not redeem the Properties.

Indyway's contentions that Los Angeles County failed to comply with other applicable procedures and

laws, including sections 2610.5 and 3691.1, are not preserved for review because these issues were not raised at the trial (*Kuperman v. San Diego County Assessment Appeals Bd. No. 1* (2006) 137 Cal.App.4th 918, 930-931), were not specifically addressed in the statement of decision, and Indyway did not object to the statement of decision on these grounds (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 498 [objection to statement of decision must be specific]). Were we to address the merits, we would conclude that these contentions are unsupported by the evidence or any legal authority establishing that the alleged violations would constitute a basis to set aside a tax sale.

B. Order Denying Motion to Tax Costs

Indyway maintains that Opri was collaterally estopped from recovering statutory costs as the prevailing party (Code Civ. Proc., § 1032, subd. (b)) because the trial court had previously denied her motion for expenses based on Code of Civil Procedure section 2033.420, allowing costs and attorney fees incurred in proving the truth of matters denied in responding to a request for admission.[2]

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[2] Code of Civil Procedure section 1032 provides in pertinent part: "(b) Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding."

Under Code of Civil Procedure section 2033.420, subdivision (b), the court may deny recovery of expenses

As pointed out by Opri, the record does not reveal the basis for the trial court's denial of the motion under Code of Civil Procedure section 2033.420. (See fn. 2, *ante*.) One of the required elements for application of the collateral estoppel doctrine is that the issue necessarily decided at the previous proceeding must be identical to the one which is sought to be relitigated. (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 148.) Because Indyway fails to establish this element with citation to the record and pertinent authority, Indyway's challenge to Opri's cost award is without merit.

C. Opri's Motion for Sanctions and for Attorney Fees and Costs Pursuant to Contract

Pursuant to *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, Opri seeks $25,000 in sanctions on the ground that the appeal is frivolous. Although Indyway has not filed model briefs (see, e.g., *In re S.C., supra,* 138 Cal.App.4th at pp. 414-416), we decline to impose sanctions.

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sought by a party who proves the truth of a matter denied by his opponent in a response to a request for admission if it finds that "(1) An objection to the request was sustained or a response to it was waived under Section 2033.290. [¶] (2) The admission sought was of no substantial importance. [¶] (3) The party failing to make the admission had reasonable ground to believe that the party would prevail on the matter. [¶] (4) There was other good reason for the failure to admit."

Based on an attorney fee provision of the retainer contract between Indyway and Opri, Opri seeks attorney fees of approximately $46,000 if she is the prevailing party on appeal.[3] Because we affirm the judgment, Opri is entitled to her attorney fees on appeal, with the amount to be determined by the trial court on remand. (*Butler-Rupp v. Lourdeaux* (2007) 154 Cal.App.4th 918, 924; Cal. Rules of Court, rules 8.276(d), 3.1702(c).)

DISPOSITION

The judgment and the order are affirmed. Debra Opri and Opri & Associates are entitled to their costs and attorney fees on appeal. The motion of Debra Opri and Opri & Associates requesting attorney fees on appeal is granted in an amount to be determined by the trial court on remand. The motion of Debra Opri and Opri & Associates requesting sanctions on appeal is denied.

NOT TO BE PUBLISHED.

MALLANO, Acting P. J.

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[3] The retainer agreement provides in pertinent part: "Any disputes arising out of this agreement shall be arbitrated before the Beverly Hills Bar Association. If Client waives arbitration and proceeds into litigation, the successful party at the outcome of any award or judgment will be entitled to attorney fees and costs."

We concur:

VOGEL, J.

JACKSON, J.*

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* Judge of the Los Angeles Superior court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION: 1

DATE: December 27, 2007

A. James Artiano
Artiano & Associates, APC
3828 Carson Street
Suite 102
Torrance, CA 90503-6706

Indyway Investment
v.
Debra a. Opri et al.

B189573
Los Angeles County No. BC317170

THE COURT:

Petition for rehearing is denied.

cc: File

Nemecek & Cole
a Professional Corporation
15260 Ventura Boulevard, Suite 920
Sherman Oaks, California 91403-5344
Telephone (818) 788-9500
Facsimile (818) 501-0328

SUPERIOR COURT OF
THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

REC'D
JAN 04 2006
Filing Window

FILED
Los Angeles Superior Court
JAN 9 2006
John A. Clarke, Clerk
/s/ S. Wong
By S. Wong, Deputy

INDYWAY INVESTMENT, a non-associated unincorporated Business Trust Organization by and Through its trustee, Deron Brunson

Plaintiffs,

-vs-

DEBRA OPRI, an individual, OPRI & ASSOCIATES, a Professional Law Corporation, PHILLIP M. SMITH, JR. an individual, PHILLIP M. SMITH, JR., INC. a Professional Corporation; and DOES 1 through 100, inclusive

Defendants.

Case No. BC 317170
[Assigned to Department 40,

Honorable Judge David A. Workman]

JUDGMENT

Trial Date: October 24, 2005
Dept.: 40

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that the Court having signed the Statement of Decision setting forth its Findings of Fact and Conclusions of Law rendered in the above-referenced matter now enters Judgment on Plaintiff's Complaint in conformity with its Statement of Decision.

First Cause of Action

On Plaintiff's first cause of action for legal malpractice, the Court enters judgment for the Defendants and against the Plaintiff;

Second Cause of Action

On Plaintiff's second cause of action for breach of contract, the Court enters judgment for the Defendants and against the Plaintiff.

IN LIGHT OF THE FOREGOING, IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff INDYWAY INVESTMENT TRUST shall take nothing by way of its Complaint and that Defendants DEBRA OPRI and OPRI &

ASSOCIATES shall recover from Plaintiff cost of suit in the sum of $17,355.98 as ordered by the court pursuant to a cost bill which shall be served commensurate with Code of Civil Procedure §1032, et seq. and California Rule of Court, Rule 870; *and plus Attorney's Fees in the sum of $129,854.50.*
/s/ dl
6-1-06

Dated: January 9, 2006

/s/ David A. Workman
Judge of the Superior
Court of California

/s/ dl
6-1-06
Cost from memo of cost affixed - D Larson, Clerk D-19
Fees from Minute Order of 6/1/06 affixed - D Larson D-19

D-1

Nemecek & Cole
a Professional Corporation
15260 Ventura Boulevard, Suite 920
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Telephone (818) 788-9500
Facsimile (818) 501-0328

SUPERIOR COURT OF
THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

REC'D
NOV 18 2005
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FILED
Los Angeles Superior Court
DEC 23 2005
John A. Clarke, Clerk
/s/ S. Wong
By S. Wong, Deputy

INDYWAY INVESTMENT, a non-associated unincorporated Business Trust Organization by and Through its trustee, Deron Brunson

Plaintiffs,

-vs-

DEBRA OPRI, an individual, OPRI & ASSOCIATES, a Professional Law Corporation, PHILLIP M. SMITH, JR. an individual, PHILLIP M. SMITH, JR., INC. a Professional Corporation; and DOES 1 through 100, inclusive

Defendants.

Case No. BC 317170

[Assigned to Department 40,
Honorable Judge David A. Workman]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND STATEMENT OF DECISION

Trial Date: October 24, 2005
Dept.: 40

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendants DEBRA OPRI, OPRI & ASSOCIATES, a Professional Law Corporation ("OPRI") hereby submits this [Proposed] Statement of Decision setting forth the Court's Findings of Fact and Conclusions of Law rendered in the above-referenced matter.

FINDINGS OF FACT

Following the submission of evidence at the trial in this matter, the Court made the following findings of fact based upon the evidence submitted in this matter. These findings are based on the exhibits submitted and the testimony of witnesses Melissa Diaz, Deron Brunson, Kedar Cohen, Ray Amavisca, Sharon Perkins, Martha Duran, John Moreno, Joyce Aiello, Inez Duarte and Sung Won Yi. After hearing the testimony, the Court gives little credibility to the Plaintiff's three principal witnesses Melissa Diaz, Deron Brunson and Ray Amavisca and the court adopts the credibility issues set forth in OPRI's Motion for Judgment that was filed pursuant to C.C.P. § 631.8 on or about October 31, 2005.

Specifically, with respect to Mr. Amavisca, the

court finds that his testimony with regard to the Proof of Service for the Change of Address Cards was not credible. With respect to Deron Brunson, the court finds that his testimony was so evasive and not forthcoming that it rendered all of his testimony suspect and without credibility. With respect to Melissa Diaz, her credibility was impeached in so many different instances, and was so evasive, that it was given no credibility. Further, the Court gives no credence whatsoever to Change of Address Cards dated October 16, 1999, (Plaintiff's Exhibit "4") and finds them to be an "offensive contrivance."

As for particular findings of facts, the Court finds as follows:

1. As of May 8, 1992 Plaintiff became the owner of those parcels of real property identified by Assessors I.D. Nos. 7429 0190 13 and 7429 0190 14 ("Lot Nos. 13 & 14"). (Exhibit "1").

2. Based on the testimony of Melissa Diaz, it was established that, at the time that Plaintiff acquired Lot Nos. 13 & 14, they were already in tax default.

3. Based on the testimony of Melissa Diaz, it was established that, after acquiring Lot Nos. 13 & 14, Plaintiff did not pay any property taxes on Lot Nos. 13 & 14 at any time.

4. As of May 1997, Lot Nos. 13 & 14 became subject to power of sale based upon their being in a tax defaulted status since May of 1992.

5. On August 15, 1997 the County of Los Angeles Tax Collector's ("The County") caused to be recorded, a Notice of Power to Sell with respect to Lot Nos. 13 & 14. (Exhibit "39" & "40").

6. As of October 12, 1999 the address of record that the County had for Plaintiff was P.O. Box 832 in North Hollywood California.

7. On October 12, 1999, Plaintiff orally instructed The County that all notices regarding Lot Nos. 13 & 14 should be mailed to 2725 Baltic Avenue, Long Beach, California ("the Baltic Avenue Address"). This instruction was confirmed by The County by letter dated October 13, 1999. (Exhibit "1034").

8. Lot Nos. 13 & 14 were placed in the Tax Defaulted Properties Auction scheduled for June 26, 2000. (Exhibit "54").

9. Based on the testimony of Sharon Perkins, Joyce Aiello and Martha Duran and based on Exhibits ("1048" & "1051"), the evidence established that The County made reasonable efforts to ascertain the last known mailing address for Plaintiff. In that regard, the County hired a private title company to obtain a Parties of Interest Report, the County then checked its records for any other properties owned by INDYWAY, cross referenced all the names of individuals in its records that were affiliated with INDYWAY and conducted a Super Pages search in an effort to locate all possible addresses for INDYWAY.

10. On May 10, 2000 the County mailed, via certified mail, return receipt requested, a Notice of Auction with respect to Lot Nos. 13 & 14 to eleven separate addresses which it was able to locate. (Exhibits "10" - "36").

11. The Notices of Auction sent by the County with respect to Lot Nos. 13 & 14 for the June 26, 2000 Auction complied with all of the requirements of R & T Code § 3701. (Exhibits "1049" & "1050").

12. Plaintiff received the Notices of the Auction for the June 26, 2000 Auction at the Baltic Avenue Address which is where Melissa Diaz resided and where Plaintiff regularly conducted its meetings. (Testimony of Melissa Diaz and Kedar Cohen, Exhibits "19" & "32")

13. Plaintiff also received the Notices of Auction at P.O. Box 832 North Hollywood California. (Exhibit "24").

14. Based on its receipt of the Notices of Auction, Plaintiff had actual notice of the June 26, 2000 auction. (Exhibits "19", "24" & "32").

15. Pursuant to Revenue and Taxation Code §§ 3707 & 4101, Plaintiff's right to redeem Lot Nos. 13 & 14 terminated on June 25, 2000.

16. Based on the testimony of Martha Duran, Sharon Perkins and Sung Won Yi, it was established that Lot Nos. 13 & 14 were sold to Sung Wo Yi at the June 26, 2000 Auction.

17. Based on the testimony of Sharon Perkins, Martha Duran and Joyce Aiello and all of the received Exhibits, it was established that The County complied with all applicable laws and procedures in connection with conducting the June 26, 2000 auction of Lot Nos. 13 & 14.

18. Based on the testimony of Sharon Perkins and Martha Duran, it was established that on August 11, 2000 the County paid the taxes owed on Lot Nos. 13 & 14 out of the proceeds from the auction sale.

19. Plaintiff failed to present any credible evidence which proved, by a preponderance of the evidence, that it ever redeemed Lot Nos. 13 & 14.

20. Plaintiff failed to present any credible evidence which proved, by a preponderance of the evidence, that the sale of Lot Nos. 13 & 14 was ever rescinded.

21. Plaintiff failed to present any evidence which proved, by a preponderance of the evidence, that the recording of the Rescission of the Notice of Power to Sell or the Cancellation of the Rescission of the Notice of Power to Sell violated Plaintiff's due process rights.

22. Plaintiff failed to present any credible evidence which proved, by a preponderance of the evidence, that Sung Won Yi committed any wrongful acts or conspired with any third parties to wrongfully acquire Lot Nos. 13 & 14.

CONCLUSION OF LAW

The Court makes the following conclusions of law based upon the causes of action asserted and the evidence submitted at the trial of this matter.

1. Plaintiff had actual notice of the June 26, 2000 Tax Defaulted Auction when it received the Notice of Auction mailed to the 2725 Baltic Avenue Address. [Revenue & Taxation Code § 3701].

2. Plaintiff's due process rights were not violated by the sale of Lot Nos. 13 & 14 since the County complied with all of the relevant laws and procedures prior to the sale of tax defaulted properties and since Plaintiff was provided with and received notice of the sale. [Bank of America v. Grant Inland R.V. Center, Inc. (2000) 78 Cal.App.4th 1267].

3. There was no fraud in connection with the Sale of Lot Nos. 13 & 14 [Revenue & Taxation Code § 3711].

4. Plaintiff failed to prove that it would have prevailed on a claim against the County had it filed a claim to set aside the sale of Lot Nos. 13 & 14.

5. Because it would not have prevailed on a claim to set aside the tax sale, Plaintiff has failed to prove that it suffered any damages as a result of any error or omission allegedly committed by OPRI and therefore cannot establish all of the elements necessary to support its causes of action for legal mal-practice or breach of contract. [United Community

Church v. Garcin (1991) 231 Cal.App.3d 327; Stanley v. Richmond (1995) 35 Cal.App.4th 1070]

STATEMENT OF DECISION

Having made the above findings o fact and conclusions of law, the court renders the following decision in this matter.

First Cause of Action

On Plaintiff's first cause of action for legal malpractice, the court finds for the Defendants and against the Plaintiff as set forth in this ruling.

Second Cause of Action

On Plaintiff's second cause of action for breach of contract, the court finds for the Defendants and against the Plaintiff as set forth in this ruling.

Dated: December 23, 2005.

/s/ David A. Workman
David A.Workman
Judge, Superior Court
of California

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 12/23/05 DEPT. 40

HONORABLE DAVID A. WORKMAN JUDGE

HONORABLE JUDGE PRO TEM
#15
H. GARCIA, CA Deputy Sheriff

S. WONG DEPUTY CLERK

ELECTRONIC RECORDING MONITOR

NONE Reporter

4:15 pm
BC317170

INDYWAY INVESTMENT
vs
DEBRA A CPRI ET AL

Plaintiff Counsel
Defendant Counsel NO APPEARANCES

NATURE OF PROCEEDINGS:

COURT ORDER;

The Court reviews defendants' proposed Findings of Fact, Conclusions of Law and Statement of Decision ("Statement of Decision") lodged November 18, 2005, plaintiff's objections thereto filed November 29, and plaintiff's request for hearing on its objections filed December 5.

The Court overrules plaintiff's objections to the proposed Statement of Decision and denies its request for hearing on the same.

The Court strikes the word "judgment" appearing at 5:10 and 5:13 of the proposed Statement of Decision, and strikes the two sentences appearing at 5:15-17 of the statement. The Court substitutes the middle initial "A" for the initial "M" appearing at 5:19 and strikes the words "The Honorable" appearing at the same place.

The Court adopts as its own the proposed Statement of Decision as so modified, and the same is signed and filed this date.

..

The Court orders counsel for defendants within ten days to serve and submit a proposed judgment as a separate document.

MINUTES ENTERED
12/23/05
COUNTY CLERK

[court caption omitted]

NATURE OF PROCEEDINGS:

Clerk to give notice.

CLERK'S CERTIFICATE OF MAILING/
NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 12-23-05 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

Date: December 23, 2005

John A. Clarke, Executive Officer/Clerk

By: /s/ S. Wong
S. Wong

Artiano, Guzman & Toomey, LLP
James Artiano
3828 Carson Street, Suite 102
Torrance, CA 90503

[court caption omitted]

NATURE OF PROCEEDINGS:

Nemecek & Cole
David B. Owen
15260 Ventura Blvd., Suite 920
Sherman Oaks, CA 91403-5399

F-1

Court of Appeal, Second Appellate District
Div. 1 – No. B189573
S159707

SUPREME COURT
FILED
FEB 27 2008
Frederick K. Ohlrich Clerk

Deputy

IN THE
SUPREME COURT OF CALIFORNIA

En Banc

INDYWAY INVESTMENT
Plaintiff and Appellant,
v.
DEBRA OPRI et al.
Defendants and Respondents.

The petition for review is denied.

George, C.J., was absent and did not participate.
Corrigan, J., was absent and did not participate.

Baxter
Acting Chief Justice

WEST'S ANNOTATED CALIFORNIA REVENUE AND TAXATION CODE

Division 1. Property Taxation
Part 6. Tax Sales
Chapter 7. Sale to Private Parties After Deed to State

§ 3691. Power to sell; sale of part of parcel; tax-defaulted parcels; definitions; notice of intended sale; nuisance abatement liens

(a)(1)(A) Five years or more, or three years or more in the case of nonresidential commercial property, after the property has become tax defaulted, the tax collector shall have the power to sell and shall attempt to sell in accordance with Section 3692 all or any portion of tax-defaulted property that has not been redeemed, without regard to the boundaries of the parcels, as provided in this chapter, unless by other provisions of law the property is not subject to sale. Any person, regardless of any prior or existing lien on, claim to, or interest in, the property, may purchase at the sale. In the case of tax-defaulted property that has been damaged by a disaster in an area declared to be a disaster area by local, state, or federal officials and whose damage has not been substantially repaired, the five-year period set forth in this subdivision shall be tolled until five years have elapsed from the date the damage to the property was incurred.

(B) A county may elect, by an ordinance or

resolution adopted by a majority vote of its entire governing body, to have the five-year time period described in subparagraph (A) apply to tax-defaulted nonresidential commercial property.

(C) For purposes of this subdivision, "nonresidential commercial property" means all property except the following:

(i) A constructed single-family or multifamily unit that is intended to be used primarily as a permanent residence, is used primarily as a permanent residence, or that is zoned as a residence, and the land on which that unit is constructed.

(ii) Real property that is used and zoned for producing commercial agricultural commodities.

(2) When a part of a tax-defaulted parcel is sold, the balance continues subject to redemption and shall be separately valued for the purpose of redemption in the manner provided by Chapter 2 (commencing with Section 4131) of Part 7.

(3) The tax collector shall provide notice of an intended sale under this subdivision in the manner prescribed by Sections 3704 and 3704.5 and any other applicable statute. If the intended sale is of nonresidential commercial property that has been tax-defaulted for fewer than five years, all of the following apply:

(A) On or before the notice date, the tax collector shall also mail, in the manner specified in

paragraph (1) of subdivision (c) of Section 2924b of the Civil Code, notice containing any information contained in the publication required under Sections 3704 and 3704.5 to, as applicable, all of the following:

(i) The parties specified in paragraph (2) of subdivision (c) of Section 2924b of the Civil Code.

(ii) Each taxing agency specified in paragraph (3) of subdivision (c) of Section 2924b of the Civil Code.

(iii) Any beneficiary of a deed of trust or a mortgagee of any mortgage recorded against the nonresidential commercial property, and any assignee or vendee of these beneficiaries or mortgagees.

(B) For purposes of this paragraph:

(i) "Notice date" means a date not less than 45 days nor more than 120 days before an intended sale or not less than 45 days nor more than 120 days before the date upon which the property may be sold.

(ii) "Recording date of the notice of default" as used in subdivision (c) of Section 2924b of the Civil Code means a date that is 30 days before the notice date.

(iii) "Deed of trust or mortgage being foreclosed" as used in subdivision (c) of Section 2924b of the Civil Code means the defaulted tax lien.

(b)(1)(A) Three years or more after the property has become tax defaulted and a request has been made by a city, county, city and county, or nonprofit organization pursuant to Section 3692.4, or a request has been made by a person or entity that has recorded a nuisance abatement lien on that property, to offer that property at the next scheduled tax sale, the tax collector shall have the power to sell and may sell all or any portion of tax-defaulted property that has not been redeemed, without regard to the boundaries of parcels, as provided in this chapter at the next scheduled tax sale, unless by other provisions of law the property is not subject to sale. Any person, regardless of any prior or existing lien on, claim to, or interest in, the property, may purchase at the sale.

(B) When a part of a tax-defaulted parcel is sold, the balance continues subject to redemption and shall be separately valued for the purpose of redemption in the manner provided by Chapter 2 (commencing with Section 4131) of Part 7.

(2) Before the tax collector sells vacant residential developed property pursuant to this subdivision, actual notice, by certified mail, shall be provided to the property owner, if the property owner's identity can be determined from the county assessor's or county recorder's records. The tax collector's power of sale shall not be affected by the failure of the property owner to receive notice.

(3) Before the tax collector sells vacant residential developed property pursuant to this subdivision,

notice of the sale shall be given in the manner specified by Section 3704.7.

(c) The amendments made to this section by the act [FN1] adding this subdivision apply to property that becomes tax defaulted on or after January 1, 2005.

[FN1]Stats.2004, c. 944 (A.B.2144).

§ 3691.1. Notice of parcel becoming subject to power of sale; acknowledgment

The tax collector shall execute a notice whenever a parcel becomes subject to the power of sale set forth in Section 3691 on a form prescribed by the Controller. The county clerk shall take acknowledgment of the notice without charge.

§ 3691.4. Recording of notice; no charge

The notice shall be recorded with the county recorder. After recordation, the notice shall be forwarded to the tax collector. The recorder shall make no charge for the recording.

§ 3701. Parties of interest; notice

Not less than 45 days nor more than 120 days before the proposed sale, the tax collector shall send notice of the proposed sale by certified mail with return receipt requested to the last known mailing

address, if available, of parties of interest, as defined in Section 4675. The notice shall state the date, time, and place of the proposed sale, the amount required to redeem the property, and the fact that the property may be redeemed up to the close of business on the last business day prior to the date of the sale, and information regarding the rights of parties of interest to claim excess proceeds, as defined in Section 4674, if the property is sold and excess proceeds result from that sale.

The tax collector shall make a reasonable effort to obtain the name and last known mailing address of parties of interest.

The validity of any sale under this chapter shall not be affected if the tax collector's reasonable effort fails to disclose the name and last known mailing address of parties of interest or if a party of interest does not receive the mailed notice.

§ 3711. Deed; conclusive evidence, exception

Except as against actual fraud, the deed duly acknowledged or proved is conclusive evidence of the regularity of all proceedings from the assessment of the assessor to the execution of the deed, both inclusive.

§ 3712. Title conveyed; encumbrances

The deed conveys title to the purchaser free of all encumbrances of any kind existing before the sale, except:

(a) Any lien for installments of taxes and special assessments, that installments will become payable upon the secured roll after the time of the sale.

(b) The lien for taxes or assessments or other rights of any taxing agency that does not consent to the sale under this chapter.

(c) Liens for special assessments levied upon the property conveyed that were, at the time of the sale under this chapter, not included in the amount necessary to redeem the tax-defaulted property, and, where a taxing agency that collects its own taxes has consented to the sale under this chapter, not included in the amount required to redeem from sale to the taxing agency.

(d) Easements constituting servitudes upon or burdens to the property, water rights, the record title to which is held separately from the title to the property; and restrictions of record.

(e) Unaccepted, recorded, irrevocable offers of dedication of the property to the public or a public entity for a public purpose, and recorded options of any taxing agency to purchase the property or any interest therein for a public purpose.

(f) Unpaid assessments under the Improvement Bond Act of 1915 (Division 10 (commencing with Section 8500) of the Streets and Highways Code) that are not satisfied as a result of the sale proceeds being applied pursuant to Chapter 1.3 (commencing with Section 4671) of Part 8, or that are being collected through a foreclosure action pursuant to Part 14 (commencing with Section 8830) of Division 10 of the Streets and Highways Code. A sale pursuant to this chapter shall not nullify, eliminate, or reduce the amount of a foreclosure judgment pursuant to Part 14 (commencing with Section 8830) of Division 10 of the Streets and Highways Code.

(g) Any federal Internal Revenue Service liens that, pursuant to provisions of federal law, are not discharged by the sale, even though the tax collector has provided proper notice to the Internal Revenue Service before that date.

(h) Unpaid special taxes under the Mello-Roos Community Facilities Act of 1982 (Chapter 2.5 (commencing with Section 53311) of Part 1 of Division 2 of Title 5 of the Government Code) that are not satisfied as a result of the sale proceeds being applied pursuant to Chapter 1.3 (commencing with Section 4671) of Part 8, or that are being collected through a foreclosure action pursuant to Section 53356.1 of the Government Code. A sale pursuant to this chapter shall not nullify, eliminate, or reduce the amount of a foreclosure judgment pursuant to Section 53356.1 of the Government Code.

Division 1. Property Taxation
Part 7. Redemption
Chapter 1. Redemption Generally

§ 4112. Collection of fees; effect of redemption; execution and recording of rescission of notice

(a) When tax-defaulted property subject to the notice recorded under Section 3691.4 is redeemed, the tax collector shall collect all of the following, in addition to the amount required to redeem:

(1) A fee of thirty-five dollars ($35) that shall be distributed to the county general fund to reimburse the county for its cost of obtaining the names and last known mailing addresses of, and for mailing notices required by Section 3701 to, parties of interest as defined by Section 4675.

(2) A fee in the amount required by Section 27361.3 of the Government Code that shall be distributed to the county recorder for the cost of recordation of a rescission of the notice, as required by subdivision (c).

(3) A fee of one hundred fifty dollars ($150) if redemption is within 90 days of the proposed date for the tax sale of the redeemed property. In the case of unsold tax sale properties remaining on the abstract after the tax sale, the fee shall become a part of the redemption amount and collectible whenever the property is redeemed. The fee shall be distributed to the county general fund to reimburse the county for

costs incurred by the county in preparing to conduct that sale.

(4) The amount described in subdivision (c) of Section 3704.7 to reimburse the county for the cost of a personal contact required by that section.

(b) Notwithstanding subdivision (a), if the tax-defaulted property is redeemed prior to the proposed sale, but after the county has incurred notice or publication costs pursuant to Section 3702 in connection with a notice of intended sale, a fee in an amount reasonably necessary to reimburse the tax collector for those costs may be collected.

(c) When tax-defaulted property subject to the notice recorded under Section 3691.4 is redeemed, the notice becomes null and void and the tax collector shall execute and record with the county recorder a rescission of the notice in the form prescribed by the Controller. The rescission shall be acknowledged by the county clerk, without charge.

(d) Any fee imposed under paragraph (1) of subdivision (a) or subdivision (b) shall be subject to the requirements of Section 54986 of the Government Code.

95

No. 07-1479

FILED
JUN 11 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

INDYWAY INVESTMENT, a non-associated unincorporated Business Trust Organization by and Through its trustee, Deron Brunson,

Petitioner,

v.

DEBRA OPRI, an individual; OPRI & ASSOCIATES, a Professional Law Corporation,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District

OPRI'S OPPOSITION TO INDYWAY'S PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT
(Supreme Court Rule 29.6)

Respondent Opri & Associates is a professional law corporation. Respondent Debra Opri owns 10% or more of Opri & Associates. No other person or entity owns more than 10% of Opri & Associates.

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I. INTRODUCTION

In this legal malpractice lawsuit, petitioner Indyway Investment ("Indyway") asks this Court to grant review of the California Court of Appeal's unpublished opinion to resolve perceived conflicts between California Revenue and Taxation Code sections 3711, 3691.1, and 4112[1] because Indyway claims that when these statutes are applied, they violate the Fifth and Fourteenth Amendments by taking property without due process of law. Indyway never raised any of these three statutes as issues at trial. Similarly, Indyway never raised sections 3711 or 4112 as issues in its appellant's opening brief ("AOB"). Indyway's AOB. Consequently, apart from one fleeting reference to section 3711, the Court of Appeal – in its *unpublished opinion* – did not issue any ruling on these statutes. A-11.[2] While Indyway tried to raise section 3691.1 as an issue on appeal, the Court of Appeal stated that it would not entertain such an effort: "sections . . . and 3691.1, are not preserved for review because these issues were not raised at trial" and section 3691.1 was not even "addressed in the [trial court's] statement of decision." A-15.

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[1] All further statutory references are to the California Revenue and Taxation Code unless otherwise indicated.

[2] Citations styled "A_" refer to the appendices to the petition. Citations styled "RT," "CT," or "Ex." refer to the California appellate record, i.e., reporter's transcript, clerk's transcript, and trial exhibits lodged with that record.

Even if the California Court of Appeal *had* issued an opinion addressing these three statutes (which it did not), that opinion would not be legal precedent and on no import because the only issue to be decided in this case is whether respondents Debra A. Opri and Opri & Associates (collectively, "Opri") committed malpractice. This legal malpractice suit did not challenge the constitutionality of these statutes and was not brought against a governmental entity, who could have defended the constitutionality of the statutes. In sum, this is not the appropriate vehicle to challenge the constitutionality of these statutes.

Nonetheless, Indyway posits two issues grounded upon these three statutes for this Court's review. Indyway's petition, p. i, Questions Presented. Indyway's petition is patently defective for several reasons.

First and predominantly, this Court's review lies from the Court of Appeal's decision. Supreme Court Rule 10(c). As the Court of Appeal has not issued a decision based on the three statutes set forth in Indyway's petition, there is nothing for this Court to review about these statutes. It is axiomatic that "'[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.'" *Pennsylvania Dept. of Corrections v. Yeskey,* 524 U.S. 206, 212-213 (1998) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970)).

Second, Indyway never identifies any ground for review under Supreme Court Rule 10(c), e.g., a state court has decided an important federal question in a way that conflicts with a decision of another state court or a United States court of appeals, a state court has decided an important question of federal law that has not been but should be settled by this court, or a state court has decided an important federal question in a way that conflicts with a decision by this court. Here, as the Court of Appeal never decided an important federal question, there is no ground for this Court's review. In fact, the validity of the California statutes and Indyway's newly-asserted violation of constitutional due process allegation were never in issue since this case and Indyway's appeal arise out of a legal malpractice claim, which never challenged the constitutional validity of the statutes.

Irrespective of Indyway's faulty petition, these statutes are not in conflict and do not violate due process, as asserted by Indyway. As discussed below, they are clear and operate in harmony with each other and afford all necessary due process requirements. Considering the substantial evidence adduced in Opri's favor at trial (A-3 – A-8; D-2 – D-6), plus the trial court's express finding that Indyway's witnesses were "without credibility," and "impeached in so many different instances" (D-3) and that Indyway's central piece of evidence was and is an "***offensive contrivance***" (D-3), which were affirmed on appeal, review of Indyway's two issues would not be of any benefit to

the public or to the body of case law. Review would not yield any significant pronouncements on these statutes.

II. STATEMENT OF THE CASE

Indyway was created to evade taxes. A-3; Ex. 2, p. 12. Four parcels of real property were transferred to Indyway in 1992. *Ibid.* Indyway refused to pay property taxes despite receiving original tax bills, reminders from the County of Los Angeles ("County") about the delinquent taxes, and substitute tax bills. *Ibid.*; III RT 921:19-922:11. Indyway acknowledged in its minutes that it rejects any purported tax liability and admitted it never paid any income tax or even filed income tax returns. *Ibid.*; Ex. 1121; III RT 922:23-925:6. The County recorded Notices of Power to Sell the property in August 1997. A-3. After eight years of non-payment of property taxes, the County notified Indyway, both in writing and orally, that the property would be sold at auction in June 2000. A-4 – A-5. Indyway acknowledged in writing that it received the County's notices. A-5. Still, Indyway did not pay the taxes. A-6; III RT 906:2-8. Consequently, the property was sold at auction to Sung Won Yi ("Yi"). A-6. After the tax deeds were issued to Yi and the delinquent taxes paid in full from the auction proceeds, the County erroneously generated a Rescission of the notice of power to sell. A-7. The County quickly discovered its post-sale error and filed a cancellation of the Rescission. *Ibid.* Notably, the

Rescission and Cancellation thereof were not sent to Indyway or Yi; they were only recorded. II RT 328:2-5.

Indyway retained Opri to bring a claim against the County to recover the money from the auction proceeds that exceeded the property taxes that were in arrears. A-2. Opri did so and the matter settled with Indyway receiving the excess proceeds. I CT 152:7-8; I CT 171-175.

Despite the express scope of their retainer agreement, Indyway sued Opri in this legal malpractice lawsuit for failing to sue the County to set aside the sale. A-2. In order to prevail on its malpractice claim against Opri, Indyway was first required to show that it could have set aside the sale to establish damages. Thus, the trial was bifurcated. Petition, p. 5, ¶ 10. In the first phase, Indyway tried to prove that the sale would have been set aside. A-2. Indyway lost – badly. *Ibid.*; D-2 – D-3.

The substantial evidence showed that the County followed the law and mailed notices of the auction to Indyway at 11 conceivable addresses for Indyway, including Indyway's current address of record, its prior address, and the situs address. A-11 – A-12. Significantly, Indyway acknowledged receiving the County's notices at its current and former addresses, by signing and returning the notices to the County. *Ibid.*; D-5, ¶¶ 12-13. Additionally, County employees testified that they orally told Indyway about the auction. III RT 363:6-18.

At trial, Indyway's three principal witnesses claimed that persons other than Indyway signed and returned the notices and Indyway tried to manufacture evidence that it had notified the County that it changed its address. A-5. The trial court rejected Indyway's claims, stating that it gave "little credibility to [Indyway's] three principal witnesses," finding their testimony: "evasive," "not forthcoming," "suspect," "without credibility," and "impeached in so many different instances." D-3; A-5. As to Indyway's central piece of evidence (an alleged change of address notice), the trial court said that it was and is an "***offensive contrivance***." *Ibid.*

Significantly, Indyway did not raise the three statutes upon which it bases its petition as issues at trial. As this was a legal malpractice action, the validity of the statutes was never at issue. The trial court thereupon issued a statement of decision, making findings of fact, conclusions of law, and a decision – all in favor of Opri. D-1 – D-8. The trial court found that Indyway did not prove that it could have set aside the County's sale. D-7. Thus, Indyway could not prevail against Opri in this legal malpractice lawsuit. *Ibid.* In its statement of decision, the trial court only made one passing reference to section 3711, stating that there was no fraud in connection with the sale of Indyway's property. D-7. The trial court did not even mention either section 3691.1 or 4112 in its decision. D-1 – D-8.

Indyway appealed. Indyway never raised sections 3711 or 4112 as issues in its AOB. As a result, apart from one insignificant mention of section 3711, the Court of Appeal – in its *unpublished opinion* – did not issue any ruling on these statutes. A-11. While Indyway attempted to raise section 3691.1 as an issue on appeal, the Court of Appeal refused to hear it, stating that "sections . . . and 3691.1, are not preserved for review because these issues were not raised at trial" and section 3691.1 was not even "addressed in the [trial court's] statement of decision." A-15. The Court of Appeal added "[w]ere we to address the merits, we would conclude that these contentions are unsupported by evidence or any legal authority establishing that the alleged violations would constitute a basis to set aside a tax sale." *Ibid.*

The Court of Appeal easily found, given the substantial evidence in favor of Opri, and the trial court's credibility determinations strongly adverse to Indyway, that all of Indyway's arguments "are without merit." A-14.

III. REASONS FOR DENYING INDYWAY'S PETITION

A. Indyway Never Raised the Three Statutes as Issues at Trial and the Court of Appeal's Opinion Does Not Adjudicate Any Issues about Those Statutes

"A petition for writ of certiorari will be granted only for compelling reasons." Supreme Court Rule 10.

First, this Court's review lies from the Court of Appeal's decision. Supreme Court Rule 10(c). As the Court of Appeal has not issued a decision based on the three statutes set forth in Indyway's petition, there is nothing for this Court to review. It is axiomatic that "'[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.'" *Pennsylvania Dept. of Corrections,* 524 U.S. 206 at pp. 212-213 quoting *Adickes*, 398 U.S. at p. 147, n. 2.

B. As the Court of Appeal Never Decided a Federal Question, There Is No Ground for Review

Second, Indyway never identifies any ground for review under Supreme Court Rule 10(c), e.g., a state court has decided an important federal question in a way that conflicts with a decision of another state court or a United States court of appeals, a state court has decided an important question of federal law that has not been but should be settled by this court, or a state court has decided an important federal question in a way that conflicts with a decision by this court. Here, as the Court of Appeal never decided an important federal question in this legal malpractice lawsuit, there is no ground for this Court's review.[3]

[3] Even if the California Court of Appeal *had* issued an opinion addressing these three statutes (which it did not), that

(Continued on following page)

Consequently, review by this court is neither appropriate nor warranted.

Even if a California Court had addressed the merits of Indyway's new argument or if this Court were to do so, the three statutes operate harmoniously and provide all required due process protections. Thus, the three statutes do not violate the Fifth and Fourteenth Amendments.

C. The Unequivocal Language of Section 3691.1 Was Followed by the County's Recordation of the Notice of Power to Sell Real Property; There Is No Conflict among Sections 3711 and 3691.1 and They Do Not Violate Due Process of Law

Indyway's first issue claims that section 3691.1 is ambiguous as to whether it requires the County to record a notice of power to sell *each* time a property comes up for a tax sale and thus, section 3711 should not be permitted to find the sale valid if the County

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opinion would not give rise to a federal question appeal as the only issue to be decided in this case is whether Opri committed malpractice. *Santisas v. Goodin,* 17 Cal.4th 599, 620 (1998) [decisions are only authority for issues "actually involved and actually decided" and not otherwise]. This lawsuit did not challenge the constitutionality of these statutes and was not brought against a governmental entity, who could have defended the constitutionality of the statutes. In sum, this is not the appropriate case to challenge the constitutionality of these statutes.

did not issue more than one notice of power to sell. Indyway's petition, p. 15. Indyway bases this claim on its assertion that the County "executive deleted" the original notice of power to sell. *Id.* at p. 17.

Preliminarily, Indyway never argued in the Court of Appeal that the County "executive deleted" the original notice of power to sell real property. A-14 – A-15; AOB. Thus, there is no foundation for this argument.

Second, section 3691.1 states that "[t]he tax collector shall execute a notice whenever a parcel becomes subject to the power set forth in section 3691 on a form prescribed by the Controller. The county clerk shall take acknowledgment of the notice without charge." The County followed this clear language – it recorded a notice of power to sell the relevant property. A-3. Indyway's argument that the County should be required to record subsequent notices has no support in section 3691.1. Further, Indyway's argument does not make sense – the notice is on record; there is no reason or purpose to record subsequent notices.

Third, Indyway never raised section 3711 in the California courts and is precluded from doing so now. *Pennsylvania Dept. of Corrections,* 524 U.S. at pp. 212-213.

In any event, section 3711 does not compete with section 3691.1. Section 3711 merely states that:

> "Except as against actual fraud, the deed duly acknowledged or proved is conclusive evidence of the regularity of all proceedings from the assessment of the assessor to the execution of the deed, both inclusive."

As these statutes facially demonstrate, there is nothing ambiguous about them. They are clear and straightforward. They do not conflict or compete with each other. They do not take property away from an owner without affording due process (notice of sale and an opportunity to be heard – by paying the delinquent taxes before the sale). Indyway had both actual notice (written and oral) of the auction and an opportunity to pay the delinquent taxes to avoid losing its property at auction; as a tax evader, it decided not to pay the taxes and subsequently, lost its property when it was sold to Yi at the County's auction. A-11 – A-13. Indyway has not presented any cogent argument as to how these statutes supposedly deprived them or deprive any California property owner of their due process rights.

D. The County Did Not Rescind the Original Notice of Power to Sell the Real Property and Indyway Did Not Redeem the Property; Thus, Destroying the Foundation of Indyway's Purported Second Issue

Indyway's second issue centers on its claim that the County rescinded the original notice of power to sell the real property and that it redeemed the property pursuant to section 4112 and thus, that the sale should not be valid under section 3711. Indyway's petition, p. i.

Though never raised by Indyway at trial or on appeal, section 3711 shows that the deed to Yi "is, in the absence of actual fraud, conclusively presumed regular in all respects when the deed to the purchaser at the public auction has been issued." *Herrington v. Weigel*, 82 Cal.App.3d 676, 683 (1978).[4]

Similarly, while Indyway never raised section 4112 at trial or on appeal, section 4112 concerns fees for redeeming property "prior to the proposed sale" and that such redemption would nullify the notice of the sale.

The substantial evidence found by the trial court, and affirmed on appeal, thoroughly undermines this Indyway claim. Substantial evidence showed that the

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[4] Both the trial court and the Court of Appeal found that Indyway did not prove any fraud in connection with the tax sale. A-14; D-7.

post-auction Rescission did not invalidate the sale and simply meant the delinquent taxes were paid with auction proceeds. A-14; II RT 378:19-28; II RT 318:16-28; IV RT 1519:1-1521:2. The Rescission cancelled the tax lien, but did not affect or cancel the sale. II RT 382:8-384:8; II RT 318:16-28.

Second, substantial evidence shows the Certificate of Redemption resulted from payment of the back taxes from the auction proceeds and did not mean Indyway redeemed the property. II RT 380:21-381:26; II RT 316:2-28; II 378:16-379:3; II RT 345:3-346:26. Indeed, Indyway admitted that it did not pay the back taxes. III RT 939:16-18; III RT 942:2-7. Accordingly, the County testified that Indyway's argument that Indyway redeemed the property is "without merit." II RT 384:4-8.

Third, substantial evidence shows that bona fide purchaser Yi – who did not have any prior dealings with Indyway – did not purchase or redeem the property for Indyway. A-14.

Fourth, the Rescission was recorded *after* the June 26, 2000 auction. A-7. "The right of redemption terminates at the close of business on the last business day prior to the date of the sale." § 3707(a)(1). That is because the property owner must pay the delinquent taxes the business day before the auction to stop the auction. A-6; II RT 379:14-22. Thus, the post-June 26, 2000 recorded Rescission and Cancellation thereof could not possibly support Indyway's argument that it redeemed the property (which can

only occur pre-auction) or that it was deprived of due process of law. A-14.

Thus, the substantial evidence showed that the County's post-auction Rescission did not affect the sale, much less nullify the original notice of power to sell recorded years earlier. A-14 – A-15. There is no issue, ambiguity, or conflict among sections 3711 or 4112, much less when applied to the facts here. Again, Indyway has not presented any valid argument that these statutes somehow, when applied, take away property without due process of law. The substantial evidence elicited at trial and as noted by the Court of Appeal conclusively established that Indyway had actual notice (written and oral) of the County's auction of the property and lost the property via the auction sale because Indyway failed and refused to pay property taxes. D-2 – D-7; A-14.[5]

IV. CONCLUSION

As Indyway never raised sections 3711 or 4112 in the courts below and the Court of Appeal did not issue a ruling on these statutes or section 3691.1, there is nothing for this Court to review. Indyway has not offered a single, valid reason why review of the Court of Appeal's unpublished opinion should be granted. In any event, the statutes are unequivocal,

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[5] As an aside, the trial court found that the County acted "admirably" and "went overboard" with its efforts to notify Indyway of the sale. V RT 2194:7-24.

not in conflict with each other or other parts of the Revenue and Taxation Code governing property tax sales, and application of them does not violate the Fifth and Fourteenth Amendments. Indyway had actual notice of the County's auction of the property because Indyway failed to pay property taxes; nonetheless, Indyway still refused to pay the taxes to avoid losing the property at the County's auction. This Court should therefore deny the petition for writ of certiorari.

Respectively submitted,

DATED: June 11, 2008

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Supreme Court, U.S.
FILED
OCT 30 2008
OFFICE OF THE CLERK

No. 07-1479

IN THE

Supreme Court of the United States

INDYWAY INVESTMENT,
Petitioner,

vs.

DEBRA OPRI, an individual
OPRI & ASSOCIATES,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEALS
SECOND APPELLATE DISTRICT, DIVISION ONE

PETITION FOR REHEARING

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I. INTRODUCTION

This petition for rehearing is intended to clarify arguments advanced in original petition for writ of certiorari. *Hickman v. Taylor*, 327 U.S. 808, 328 U.S. 876, 329 U.S. 495; *Brinkerhoff-Faris Trust Co. v. Hill*, 280 U.S. 604, 550, 281.1

Debra Opri and Opri & Associates ("Respondent") dramatically focuses Indyway Investment's ("Petitioner") lack of prosecution and jurisdictional attention on this dichotomy in a novel interpretation of the California Revenue and Taxation Codes and is germane to the constitutionality issues of these statutes which Petitioner seeks to clarify below.

Petitioner respectfully submits that the instant case offers extraordinary circumstances of the taxing authorities abuse of the public auction process and requests that this Court to affirm its historic mandate prohibiting a state from depriving any person of life, liberty, or property, without due process of law as preserved under the Fifth and Fourteenth Amendments to the United States Constitution, as well as other constitutional protection as envisioned by the framers when confronted with the abusive consequences of due process of law violations.

Contrary to Respondent's opinion that Indyway was created to evade taxes, Indyway owned a fifth property having Assessor Parcel Number 7313-021-016 that is also named on Indyway's deed recorded on May 11, 1992 which was never in arrears with property taxes.

The underlying issue herein under review addresses the due process of law that must be

accorded to a citizen before the government can exercise the privileged power of taking and selling of his property.

This petition asks this Court to align the essential elements of due process of law, specifically the constitutional guaranty demanding only that the law shall be reasonable, and not arbitrary or capricious, and that the means selected shall have real substantial relation to object. *Nebbia v. People of State of New York, N. Y.*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940; *North American Co. v. Securities & Exchange Commission*, C.C.A.2, 133 F.2d 148, 154. And the opportunity to be heard and to defend in orderly proceeding and the guarantee of due process of law requires that every man have protection of day in court and benefit of general law. *Di Maio v. Reid*, 132 N.J.L. 17, 37 A.2d 829, 830.

The abusive consequences of violations of due process of law are of a degree of severity to justify this petition. The trial court prevented Petitioner from fully and fairly presenting its cause, coupled with the Court of Appeal's prejudicial and erroneous assumption that certain arguments were not presented in the trial court and not preserved on appeal.

This Petition for Rehearing is not meant to reargue that which is in the Petition for a Writ of Certiorari denied on October 6, 2008.

II. STATEMENT OF THE CASE

This is an action for damages sustained by Indyway Investment ("Indyway") as a result of the legal malpractice committed by attorney Debra Opri and her law office Opri & Associates ("Opri").

Indyway had owned certain properties located in Long Beach, California ("the Subject Properties"), which the County of Los Angeles ("the County") sold at a tax-default property sale in June of 2000. Indyway had hired Opri to file a claim to set aside the tax sale of the Subject Properties. Instead, Opri filed a claim for the excess proceeds from the sale, and failed to file a claim to set aside the tax sale of the Subject Properties. On June 16, 2004, Indyway filed a verified complaint alleging legal malpractice and breach of contract against Opri.

A client sustains damages by his attorney's legal malpractice only where an attorney's error or omission caused a client to lose a meritorious claim. *See DiPalma v. Seldman* (1994) 27 Cal. 4th 1499, 1505. Thus, upon the parties' stipulation, the trial court ordered the bifurcation of issues at trial, so that it would first decide the issue of damages, namely whether a claim to set aside the tax sale of the Subject Properties would have been meritorious. The rationale for the bifurcation was that if damages could not be proven, there could be no case made for legal malpractice.

III. REQUEST TO TAKE JUDICIAL NOTICE

Petitioner hereby requests this Court take judicial notice of facts referenced in Petitioner's other case filed with this Court on September 22, 2008, having Docket No. 08-392. This case mirrors the same extraordinary circumstances with the instant case except that the County failed to record a Rescission of Notice of Power to Sell required

under *California's Revenue and Taxation Code*[1] *section 4112(c)* after the real property had been redeemed, as stated under Questions Presented in petition for writ of certiorari.

IV. REASONS FOR GRANTING THIS PETITION

A. The Lower Courts Limited Indyway's Prosecution of its Case, Preventing Indyway From Fully and Fairly Presenting its Cause

In Indyway's Petition for Rehearing filed with the Court of Appeal on December 14, 2007, the Court of Appeal made an erroneous assumption that certain arguments were not presented to the trial court and not preserved on appeal. Furthermore, Indyway's Petition for Rehearing cited trial references which were supported by exhibits admitted and received into evidence.

The Court of Appeal stated in its discussion that Indyway's arguments constitute challenges to the sufficiency of the evidence and are without merits based on credibility determinations and inferences rejected by the trial court. Here, the Court of Appeal revealed that the trial court had limited Indyway's prosecution of its case to a narrow issue, preventing Indyway from fully and fairly presenting its cause which constituted an act of prejudice. Indyway contends that it never had a chance to prosecute its case on a fair playing field because the trial court disregarded the facts

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[1] Unless otherwise indicated, all code section references in this petition for rehearing are to *California's Revenue and Taxation Code.*

presented by Indyway at trial. *Hudgins v. State*, 2 Ga 173, 176.

In addition, the Court of Appeal also stated, "Indyway's brief also refers to exhibits which were not admitted at trial and not included in the appellate record." This statement by the Court of Appeal is patently misplaced because Indyway did include all exhibits admitted and received into evidence at trial as evident in Indyway's joint amended notice Designating Papers and Records filed on August 9, 2006.

Furthermore, with respect to the Rescission issue, the trial court stated, "It's a Due Process question. Was the property sold without Due Process of Law? So aren't we wasting a lot of time in looking at what the County did or did not do after the sale." [RT5 2127:27-28, 2128:1-3] [EX 41, EX 42]. Here, the trial court demonstrated how it disregarded the facts presented by Indyway at trial regarding the Rescissions of a Notice of Power to Sell, which is governed by *section 4112(c).*

B. The County Employees' Testimonies Can be Characterized as Extrinsic Fraud Committed Against Indyway, in That They Affected the Manner in Which the Judgment Was Taken That There Has Not Been a Fair Submission of the Controversy to the Court

The County employees' testimonies can be characterized as extrinsic fraud committed against Indyway. The character of fraud which will afford a ground for setting aside a judgment, that is, fraud which is collateral to the issues tried in the case

wherein the judgment was rendered. 30A Am J Rev Ed Judgm § 657. For the purpose of a ground of equitable relief against a judgment, fraud which has prevented a party from having a trial, from presenting all his case to the court, or has so affected the manner in which the judgment was taken that there has not been a fair submission of the controversy to the court. *Farley v. Davis*, 10 Wash 2d 62, 116 P2d 263, 155 ALR 1302.

Although Indyway vehemently objected to the testimony of County Counsel, Joyce M. Aiello, the trial court allowed the witness to state a conclusion of law on whether due process was followed or not. [RT4 1205:1-14, 1213:18-23, 1214:8-22, 1216:7-28, 1217:1-15, 1218:21-28]. Similarly, the trial court denied Indyway's filed memorandum and motion to exclude the testimony of County Counsel to give her opinion as to whether there were irregularities in the whole statutory process before, during and after the purported tax sale of Indyway's Property. [1219 to 1220]. The trial court twice denied Indyway's attempt to voir dire the witness. [RT4 1211:4-18, 1212:13-15]. The testimony of County Counsel directly affected the interpretation of a statute, specifically *section 3691.1*, when the witness testified that she did not find any irregularities in the publication of auction. [RT4 1216:18, 1217:1-2].

Ultimately, the trial court allowed County Counsel to make a conclusion of law by stating, "My conclusion, there were no irregularities or errors in the sale of Parcels 13 and 14." [RT4 1221:4-12]. Indyway believes that the testimony of County Counsel, who was not an expert, who had not been designated to interpret the law directly affected the manner in which the judgment was taken and provides justification that the trial court did not fairly determine the issues before it.

In addition, *section 4112(c)* was cited in an exchange between Opri's counsel, Mr. Owen, and the trial court.

Mr. Owen: "Your Honor, if I might, I think we're getting a misstatement of law too because R&T Code Section 4112 specifically requires that a Notice of Rescission be filed any time the property is redeemed. So there's no error by the County - -"

The Court: "There really was no glitch in the System."

Mr. Owen: "There was no glitch in the System, but they found out it was a superfluous document. It wasn't necessary because the Tax Deed cancels the Notice of Power to Sell, but statutorily they're to do it. So it's not a glitch."

The Court: "There's also testimony of your witness, I think it was Ms. Perkins - -"

Mr. Owen: "Ms. Perkins."

The Court: "- - That they have corrected the System now. And in a case of a transfer of title subsequent to a tax evolved sale, the Notice of Rescission is not sent out at all."

Mr. Owen: "Not any longer. But when you read the statute, it's still required to be sent out. So it seems to me the statute is poorly written, but it certainly requires that the Cancellation of Rescission be filed. And I'm referring to R&T Code Section 4112(c)."

[Reporter's Transcript, Volume 5, page 2129, lines 6-28 and page 2130, lines 1-3.]

In the above exchange, Mr. Owen relied on the interpretation of *section 4112(c)* as support for the Cancellation of Rescission. However, the reading of this statute reveals no basis for such reliance. Under *section 4112(c)*, the **redemption** of a tax-defaulted property merely terminates the state's power to sell a tax-defaulted property. Mr. Owen's argument does not make any sense. Here, the trial court and Opri agreed that according to *section 4112(c)*, the County is required to execute a Rescission of Notice of Power to Sell. However, in Petitioner's other case filed with this Court on September 22, 2008, having Docket No. 08-392, that mirrors the same extraordinary circumstances, the County failed to do so. Herein lie the inconsistencies and contradictions in the application of the statutes.

Despite numerous requests from Indyway during discovery and pre-trial for the County's files regarding the tax sale of the Subject Properties, the County refused to produce the file until the trial judge ordered the County to do so on the last day of trial. [RT5 1524:17-28, 1525:1-6, 1526:23-28, 1527-1533]. This highly suspicious conduct by the County suggests that there was a clear attempt to suppress facts and to prevent Indyway from presenting and prosecuting its entire cause. The County's actions can be characterized as extrinsic fraud that directly affected the manner in which the judgment was taken.

C. The Cancellation of Rescission Is a False Instrument Because It Cites a Code That Has No Relevance to the Document Which Is An Intrinsic Fraud

Intrinsic Fraud which occurs within framework of actual conduct of trial and pertains to and affects determination of issues presented therein, and it may be accomplished by perjury, or by use of false or forged instruments, or by concealment or misrepresentation of evidence. *Auerbach v. Samuels*, 10 Utah 2d 152, 349 P.2d 1112, 1114. Fraud is "intrinsic fraud" where judgment is founded on fraudulent instruments or perjured evidence or the fraudulent actions pertain to an issue involved in original action and litigated therein. *Alleghany Corp. v. Kirby*, D.C. N.Y., 218 F.Supp. 164, 183.

Species of fraud which renders the document void as, for example, an instrument signed by one who had neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms, is not enforceable even by a holder in due course because such fraud is intrinsic.

Respondent argued that ". . . the County erroneously generates a Rescission of the notice of power to sell. . . The County quickly discovered it post-sale error and filed a cancellation of the Rescission." At trial, the County testified that Rescissions of the notice of power to sell were mistakenly recorded for all ("several hundred parcels") properties subject to the 2000B tax sale because of a "glitch" in the System. [RT2 321:2-7; RT4 1519:1-24] [EX 41, EX 42]. The County explained that to rectify the "glitch", it recorded a Cancellation of Rescission of notice of power to sell.

[RT2 328:15-21] [EX 43, EX44]. A mistake with this magnitude would warrant the County to execute the Cancellations of Rescission as soon as possible. However, the County waited until July 24, 2002, almost twenty-one (21) months **after** the execution of the Rescissions of the notice of power to sell, to execute and record the Cancellation of Rescissions. At trial, Indyway argued that the Cancellations of Rescission cites *Revenue and Taxation Code, section 4992,* which has no relevance and does not support the documents. [RT2 328:15-26]. These Cancellations of Rescission are tantamount to wild deeds and are without legal validity or effect.

Moreover, these Cancellations of Rescission violate the *County Tax Collector's Reference Manual section 5475* because it does not show the name of the assessee as it was shown on the recorded Notices of Power to Sell. [EX 127]. These errors by the County are factors in the County's calculated and intentional actions of misleading and misinforming the trial court and Indyway of the true status of the Properties with these documents, which are "intrinsic fraud" where judgment is founded on fraudulent instruments or perjured evidence.

D. The Lower Courts Had Decided on an Important Federal Question Raised in Indyway's Petition That Warrants This Court's Jurisdiction

Respondent challenged jurisdiction on the grounds that Indyway failed to identify basis for review under Supreme Court Rule 10(c) and the Court of Appeal never decided an important federal question. However, the trial court made the following finding of facts in its Statement of

Decision that are governed by *sections 3691.1 and 4112*, which were also affirmed by the Court of Appeal.

The Statement of Decision, Number 17 of the Findings of Fact, states, "Based on the testimony of Sharon Perkins, Martha Duran and Joyce Aiello and all of the received Exhibits, it was established that the County complied with all applicable laws and procedures in connection with conducting the June 26, 2000 Auction of Lot Nos. 13 & 14."

The trial court findings did not reference Indyway's challenge to *Revenue and Taxation Code sections 3691.1 and 4112(c).* The Court of Appeal dismissed Indyway's argument to these code sections for Indyway's apparent failure to raise the code sections or issues at trial. As set forth in Indyway's Petition for Rehearing filed with the Court of Appeal on December 14, 2007, Indyway did in fact raised and made the arguments of these sections supported by exhibits admitted and received into evidence to the trial court; it was the trial court that disregarded the arguments.

Numbers 19, 20 and 21 of the Findings of Fact, states that Indyway never redeemed its properties, failed to present any credible evidence which proved that the sale of its properties was ever rescinded, and failed to present any evidence which proved that the recording of the Rescissions of the notice of power to sell or the Cancellation of the Rescission violated Indyway's due process rights. The governing statute for the Redeeming provision is *section 4112(c).* As set forth in Indyway's Petition for Rehearing filed with the Court of Appeal on December 14, 2007, Indyway did in fact raised and made the arguments of Rescission and Redemption issues supported by exhibits admitted and received

into evidence to the trial court; it was the trial court that disregarded the arguments.

Respondent argued that "Indyway never raised *section 3711* in the California courts and is precluded from doing so." ROB-10. Respondent's argument on this issue is misplaced because it was her that raised the defense of *section 3711*, supporting the validity of tax sale. [RT2 52:17-25]

V. CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that this Petition for Rehearing be granted, which would yield significant pronouncements on the disparity and conflicts between the interpretation of the *California Revenue and Taxation Code sections* set forth in original petition for writ of certiorari, because when applied, violate the Fifth and Fourteenth Amendments to the United States Constitution by taking property without due process of law.

Dated: October 28, 2008

Respectfully submitted,

ARTIANO & ASSOCIATES, APC

By: JAMES ARTIANO

Attorneys for Petitioner
Indyway Investment

CERTIFICATION OF COUNSEL

No. 07-1479

INDYWAY INVESTMENT,
Petitioner,
vs.
DEBRA OPRI, an individual,
OPRI & ASSOCIATES,
A Professional Law Corporation,
Respondents.

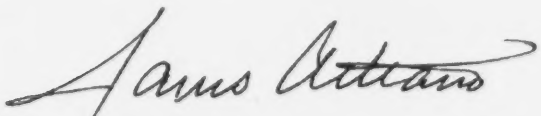
As required by Supreme Court Rule 44(1) and (2), I certify that the Petition for Rehearing of the Order Denying the Petition for Writ of Certiorari is presented in good faith and not for the purposes of delay.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 29th day of October, 2008.

Respectfully submitted,

ARTIANO & ASSOCIATES, APC



By: JAMES ARTIANO

Attorneys for Petitioner
Indyway Investment

APPENDIX

WEST'S ANNOTATED CALIFORNIA REVENUE AND TAXATION CODE

Division 1. Property Taxation
Part 6. Tax Sales
Chapter 7. Sale to Private Parties After Deed to State

§ 3691.1. Notice of parcel becoming subject to power of sale; acknowledgment

The tax collector shall execute a notice whenever a parcel becomes subject to the power of sale set forth in Section 3691 on a form prescribed by the Controller. The county clerk shall take acknowledgment of the notice without charge.

Division 1. Property Taxation
Part 7. Redemption
Chapter 1. Redemption Generally

§ 4112. Collection of fees; effect of redemption; execution and recording of rescission of notice

(a) When tax-defaulted property subject to the notice recorded under Section 3691.4 is redeemed, the tax collector shall collect all of the following, in addition to the amount required to redeem:

(1) A fee of thirty-five dollars ($35) that shall be distributed to the county general fund to reimburse the county for its cost of obtaining the names and last known mailing addresses of, and for mailing notices

required by Section 3701 to, parties of interest as defined by Section 4675.

(2) A fee in the amount required by Section 27361.3 of the Government Code that shall be distributed to the county recorder for the cost of recordation of a rescission of the notice, as required by subdivision (c).

(3) A fee of one hundred fifty dollars ($150) if redemption is within 90 days of the proposed date for the tax sale of the redeemed property. In the case of unsold tax sale properties remaining on the abstract after the tax sale, the fee shall become a part of the redemption amount and collectible whenever the property is redeemed. The fee shall be distributed to the county general fund to reimburse the county for costs incurred by the county in preparing to conduct that sale.

(4) The amount described in subdivision (c) of Section 3704.7 to reimburse the county for the cost of a personal contact required by that section.

(b) Notwithstanding subdivision (a), if the tax-defaulted property is redeemed prior to the proposed sale, but after the county has incurred notice or publication costs pursuant to Section 3702 in connection with a notice of intended sale, a fee in an amount reasonably necessary to reimburse the tax collector for those costs may be collected.

(c) When tax-defaulted property subject to the notice recorded under Section 3691.4 is redeemed, the notice

becomes null and void and the tax collector shall execute and record with the county recorder a rescission of the notice in the form prescribed by the Controller. The rescission shall be acknowledged by the county clerk, without charge.

(d) Any fee imposed under paragraph (1) of subdivision (a) or subdivision (b) shall be subject to the requirements of Section 54986 of the Government Code.

Division 1. Property Taxation
Part 9. Corrections, Cancellations, and Refunds
Chapter 4. Cancellations (Refs & Annos)
Article 1. Generally (Refs & Annos)

§ 4992. Cancellation of power to sell; entry on records

If the tax collector declares property subject to a power of sale pursuant to Section 3691 and, either (a) the declaration that the property is tax defaulted is canceled under Section 4991, or (b) the power to sell is void because of any error occurring subsequent to the declaration, then the tax collector, with the approval of the auditor, shall cancel the power to sell in the form prescribed by the Controller. The cancellation shall be acknowledged, without charge, and shall be recorded with the county recorder, without charge.

The fact and date of the cancellation shall be entered on the abstract or electronic data processing records.